

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 TYLER DIVISION

3 SOVERAIN SOFTWARE)
4 -vs-) DOCKET NO. 6:07cv511
5 NEWEGG, INC.) Tyler, Texas
6) 9:00 a.m.
7) April 27, 2010

7 TRANSCRIPT OF TRIAL
8 MORNING SESSION
9 BEFORE THE HONORABLE LEONARD DAVIS,
10 UNITED STATES DISTRICT JUDGE, AND A JURY

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24 produced by a Computer.

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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 All right. I understand the parties have
6 something to bring up before we bring the jury in?

7 MR. ADAMO: I'm afraid so, Your Honor.

8 Mr. Satine will address it for us.

9 THE COURT: Okay. What is it?

10 MR. SATINE: Your Honor, one of our
11 witnesses this morning -- or this afternoon, will be
12 Mr. Nawrocki, the damages expert. We provided these
13 demonstratives to the other side last night.

14 We spent quite a bit of time talking, but
15 there are many objections that we have not been able to
16 work out. We have a number of objections to our use of
17 any financial information of Newegg's, any indication
18 that Newegg used the patents prior to the damage period.

19 We have not been able to work that out,
20 Your Honor.

21 I'll hand up a copy of the slide.
22 Somebody can explain the objection they have, and I will
23 respond.

24 THE COURT: All right. What are the
25 objections?

1 MR. SAYLES: May it please the Court.

2 First, the objections would go to the
3 underlying exhibits that would support certain of the
4 slides. Those exhibits are Exhibits 162 through 176 and
5 245. The nature of these exhibits -- and I do --

6 THE COURT: Is that Plaintiff's
7 exhibit -- Plaintiff's exhibit numbers?

8 MR. SAYLES: Yes, they are Plaintiff's
9 exhibit numbers.

10 THE COURT: Okay.

11 MR. SAYLES: And I do have, in writing,
12 the objections that we have made to those exhibits, but
13 I can summarize it a bit for the Court.

14 THE COURT: Okay. Why don't you hand me
15 up the written objections where I can look at that.

16 MR. SAYLES: Mark, would you do that?

17 And, Your Honor, it's hard to see the 1,
18 but that's 162. It kind of looks like 62.

19 THE COURT: Okay.

20 MR. SAYLES: All right. The documents at
21 issue evidence Newegg's total sales revenues or profits.
22 Mr. Nawrocki, the Plaintiff's damage expert, relies on
23 these documents to calculate his royalty, which is
24 approximately 25 percent of Newegg's total profits from
25 its revenues.

1 Without a predicate that Newegg's total
2 profit is the proper royalty base, the evidence is
3 irrelevant and prejudicial.

4 To base royalty on Newegg's total
5 profits, Soverain and Mr. Nawrocki must show that the
6 patents-in-suit drive the demand for the sale of
7 Newegg's website. They have not done so and indeed
8 represent that they need not do so.

9 Absent such a showing or even attempted
10 showing, Newegg's total sales revenue have no proper
11 bearing on a reasonable royalty calculation, and the
12 documents should be excluded.

13 The documents at issue also show that
14 Newegg has very high revenues, on the order of 2 to \$2.5
15 billion annually. This proffer is essentially number
16 dropping.

17 Since Soverain has not properly
18 apportioned these revenues to demonstrate the amount
19 creditable to the invention, it's unfairly prejudicial
20 for the jury to hear about Newegg's substantial revenues
21 which Soverain offers to support their unapportioned
22 and, therefore, overstated royalty.

23 And in further support of those
24 objections, I would submit that the testimony, evidence,
25 and documents concerning an accused infringer's net

1 worth or total revenue or revenues from sales of
2 anything than the actual royalty base, should be
3 excluded.

4 And with respect to that objection, the
5 slides -- Mark, do you have my slides?

6 Judge, I'll point out the slides these
7 pertain to, but those are our objections to Exhibits 162
8 through 176 and Exhibit 245.

9 THE COURT: And what are those exhibits,
10 financial reports?

11 MR. SAYLES: Yes, Your Honor.

12 THE COURT: All right.

13 MR. SAYLES: They're financial reports
14 with these large numbers in them.

15 And to carry over to the slides that will
16 be used with Mr. Nawrocki, we object to Slide No. 5; and
17 if the Court can see there, one of the bases for that is
18 Plaintiff's Exhibit 174, which is objected to.

19 In addition, in this case, Your Honor --
20 and this applies to Slide 5 and a couple of others --
21 the damage period is stipulated to be from the date of
22 filing the suit in 2007 until the date of trial. The
23 extent-of-use numbers shown on Slide 5 go back to 2001.

24 We submit that any numbers that are
25 submitted and shown to the jury prior to the damage

1 period that begins in 2007 could be prejudicial,
2 misleading, and irrelevant and might lead to an
3 erroneous conclusion that damages would be entitled for
4 that period.

5 With respect to Slide 6, the same
6 objection applies. There the extent-of-use is bar
7 graphed, and it goes back to 2005. It is color-coded
8 for the damages period, but, nevertheless, it does show
9 the number of transactions in prior years going back --

10 THE COURT: The jury is going to be
11 clearly instructed on the damage period in the Court's
12 charge, so -- go ahead.

13 MR. SAYLES: All right. We object to
14 Slide No. 12, and that's primarily for the statement at
15 the bottom of the slide that Newegg's commercial
16 success, current popularity, and profitability is a
17 factor that the jury should consider, because in this
18 case, the -- there's been no showing that it is so
19 successful and popular because of the patented features
20 that are at issue here.

21 And Newegg's commercial success is not a
22 Georgia-Pacific Factor; rather, it is the commercial
23 success of the patented technology that's a proper
24 consideration. And there are lots of reasons for
25 Newegg's success.

1 Then Slide 13 is founded on Exhibit --
2 Plaintiff's Exhibit 245, to which we object, and it
3 mentions net sales of \$2.1 billion, and we object to
4 that as irrelevant and unfairly prejudicial.

5 Slide 15 is founded upon Plaintiff's
6 Exhibit 174, which is objected to, and here again, this
7 is a bar graph showing Newegg's extent-of-use, and it
8 goes back to 2001, and we object to anything prior to
9 2007 as irrelevant, misleading, and potentially
10 prejudicial.

11 Slides 16, 17, 18, and 19 are all of the
12 same nature. They are all founded on the documents that
13 I objected to specifically. They state the net sales
14 numbers and gross profits, as I've argued earlier, and
15 we submit that a calculation, based on that, and a
16 showing of that is irrelevant and prejudicial.

17 And so, Your Honor, those are the
18 Defendant's objections to the underlying exhibits, 162
19 through 176 and 245, and the slides that are based upon
20 them.

21 THE COURT: Okay. Thank you.

22 Let me ask you this, Mr. Sayles:
23 Obviously, you have known what their damage expert's
24 approach was since you had his report and deposed him, I
25 take it.

1 MR. SAYLES: That is true, Your Honor.

2 THE COURT: Have you -- have you made or
3 have we addressed any type of challenge to his
4 methodology by way of Daubert or otherwise?

5 MR. SAYLES: Yes, we have.

6 THE COURT: Okay.

7 MR. SAYLES: We had a Daubert motion
8 directed to this issue, and it was denied.

9 THE COURT: Okay. Well, all right. And
10 let me hear a response, please.

11 MR. SATINE: Your Honor, that is the
12 first point, that there was a Daubert motion directed to
13 this. We pointed out, Your Honor --

14 THE COURT: Lower the microphone a little
15 bit, if you would, please. Thank you.

16 MR. SATINE: I'm sorry.

17 Your Honor, we did have a Daubert motion
18 directed to this, and what we discussed during the
19 argument on that Daubert motion was that Mr. Nawrocki
20 does not use this information with respect to revenue
21 for his royalty base. This was a factor that he used in
22 connection with his royalty rate.

23 That was argued to Your Honor. Your
24 Honor denied the Daubert motion.

25 And with respect to consideration of

1 royalty rate, there are cases -- this Court, in i4i,
2 said an expert can consider sales revenues in connection
3 with royalty rates. That does not violate the entire
4 market value rule.

5 Same sort of holding in OPTi, Inc.,
6 versus Apple in this district, December 3rd, 2009.
7 Throughout the Georgia-Pacific Factors 8, 11, 14, and
8 one thing Mr. Sayles did not --

9 THE COURT: What are you using as the
10 royalty base, and how are you directing it to the -- to
11 the accused invention?

12 MR. SATINE: Mr. Nawrocki -- what
13 Mr. Nawrocki does is he calculates what the rate of --
14 the rate of return is, the profitability of Newegg, and
15 he takes that into consideration in determining what is
16 a reasonable royalty to apply to the royalty base, which
17 is the number of transactions which infringe the patent.

18 His base is the number of transactions,
19 because our position is that the transaction
20 infringes --

21 THE COURT: All right. Objections are
22 overruled.

23 What else?

24 MR. SAYLES: Your Honor, yesterday I
25 mentioned to you that in the interest of time, we would

1 work with the other side and narrow our objections to
2 bringing color-coded remaining objections, and I have
3 done that.

4 THE COURT: Okay.

5 MR. SAYLES: We have the objections in
6 writing, and we have Soverain's designations in red and
7 Newegg's in yellow. And there are not very many of
8 them, but I brought three copies --

9 THE COURT: Okay.

10 MR. SAYLES: -- for the Court's
11 consideration.

12 THE COURT: All right. Pass those up,
13 please.

14 All right. What else? I'll take a look
15 at these.

16 MR. ADAMO: Your Honor -- and I won't
17 take the Court's time to do this now, but in view of
18 your ruling on those exhibits, I want to talk to
19 Mr. Sayles about whether he will now stipulate them into
20 evidence because --

21 THE COURT: Whether he'll what?

22 MR. ADAMO: Whether he will stipulate
23 that they can come into evidence, because you've just
24 resolved what the objection was, and I think --

25 THE COURT: Right. Your objection is

1 preserved.

2 MR. SAYLES: All right. If my objections
3 are preserved and they're offered in evidence, that's
4 all I can do.

5 THE COURT: That's right. Okay.

6 MR. ADAMO: Okay.

7 THE COURT: Thank you.

8 MR. ADAMO: Thank you.

9 THE COURT: Bring the jury in, please.

10 COURT SECURITY OFFICER: All rise for the
11 jury.

12 (Jury in.)

13 THE COURT: Please be seated.

14 All right, Ladies and Gentlemen of the
15 Jury. Welcome back. I hope you had a good night's
16 sleep, and you're ready to put in a full day today,
17 so -- you did a very good job yesterday paying close
18 attention. I saw you taking notes and listening to the
19 witness.

20 So we'll continue now with the
21 cross-examination of Mr. Grimes.

22 JACK GRIMES, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

23 CROSS-EXAMINATION

24 BY MR. BALDAUF:

25 Q Good morning, Dr. Grimes.

1 A Good morning.

2 Q Just wanted to touch a few points about your
3 background.

4 If I understood your testimony yesterday, when
5 you're not enjoying your semi-retirement, you work as an
6 expert witness, correct?

7 A I work as an expert witness, and I also am on
8 the Board of Directors of a startup company.

9 Q And you've been doing litigation expert
10 witness work since the 1990s?

11 A Yes. It started out part-time and have really
12 remained part-time all during that time. There was
13 some -- a year or two where I did it pretty much
14 full-time, but it sort of started part-time and now is
15 part-time.

16 Q And you work with an expert broker firm?

17 A Yes, I do.

18 Q So for the hourly fee that you're paid, some
19 of that goes to the broker firm; you keep the rest?

20 A Yes. That's the way it works, uh-huh.

21 Q And you've worked with the -- with counsel for
22 Soverain in a number of cases before this, correct?

23 A Yes. I've worked with them on several cases.

24 Q Is it true that you personally have never
25 designed an E-commerce system?

1 A No, I have not been involved in the design of
2 an E-commerce system, only the security aspects of
3 E-commerce, which I talked about yesterday.

4 Q Now, you took us through the claims yesterday,
5 and I certainly don't want to repeat all of that. I
6 commend you. That was a test of endurance.

7 But in all of those claims, in every one of
8 the claims, you talked about this limitation of a
9 customer computer or a buyer computer, correct?

10 A Yes, that's correct.

11 Q You were --

12 A Not all -- not all of the claims, but many of
13 the claims dealt with that, yes.

14 Q And those claims that had that limitation, do
15 you agree that the customer computers is supplied by the
16 customer?

17 A Yes, it is, with the exception of the testing
18 that Newegg does. But in almost all cases, it's
19 supplied by the customer. It's the customer's computer.

20 Q And would you agree with me that Newegg does
21 not somehow force its customers to connect to its
22 website?

23 A No. The customer decides they want to
24 purchase something, and they have to type in the Newegg
25 URL or otherwise connect to the website.

1 Q And they do so of their own free will.

2 A Certainly, just like you would, you know, pick
3 Home Depot of your own free will. It's very much the
4 same, yes.

5 Q And if no customer ever connected to the
6 Newegg website, would you agree that there would not be
7 a customer computer for the purposes of the claims?

8 A Well, the -- I mean, this is the -- Newegg's
9 description of their system.

10 Q Correct. But I'm asking you this: If no
11 customer connects, is there a customer computer present?

12 A The Newegg system would still represent a
13 customer computer; but if a customer doesn't connect,
14 then there would be no usage of the customer computer,
15 if that's -- if that's your question.

16 Q It is. Thank you.

17 A Okay.

18 Q You also testified that Newegg instructs its
19 customers how to use its website on its help page,
20 correct?

21 A Yes, among other things. But the help page is
22 quite extensive.

23 Q Can a customer choose not to follow these
24 instructions?

25 A The customer, you know, may not even be aware

1 of the web page; but if they are, then it provides
2 instructions.

3 Q But the customer can decide not to follow them
4 of their own free will?

5 A Certainly. I don't know why a customer would
6 go to a help page and then ignore the instructions, but
7 that's possible, certainly, yeah.

8 Q And based upon your testimony yesterday, I
9 take it that you agree that a customer cannot shop on
10 the Newegg website unless he or she has turned on
11 cookies on their computer?

12 A The browser -- the browser on their computer
13 must have cookies enabled in order to actually purchase
14 products.

15 Q Do you agree with me that it's up to the
16 customer whether or not they enable cookies?

17 A As I said yesterday, the default is that
18 they're enabled, but the customer could disable cookies
19 for some reason.

20 Q If the customer disables cookies for some
21 reason, can Newegg somehow go into that customer
22 computer and turn them on?

23 A No. The customer computer -- the customer has
24 to set the -- has to enable cookies; otherwise, they
25 can't purchase products.

1 Q Now, once the customer checks out at the
2 Newegg website, who's responsible for paying for the
3 selection?

4 A Well, the customer's credit card is charged,
5 so, ultimately, the customer, of course, pays his credit
6 card bill. I mean, he's purchasing the product, so the
7 customer pays for them in the end.

8 Q So do you agree with me that Newegg is not
9 responsible for paying for these products if the
10 customers do not do so?

11 A Actually, I haven't thought about that. I
12 don't know what happens. I mean, customer -- Newegg
13 certainly pays for the inventory, so they have purchased
14 the inventory. If the customer doesn't pay, I don't
15 know what happens, actually.

16 Q I'd like to talk about the '314 patent.
17 From your testimony yesterday, you told us
18 that Soverain is asserting the infringement of only
19 Claims 35 and 51, correct?

20 A Yes, that is correct.

21 Q And these claims depend upon Claim 34.

22 A Right. Exactly right, uh-huh.

23 Q So if Newegg does not infringe Claim 34, would
24 you agree with me that it cannot infringe 35 or 51?

25 A Yes. That's the way it works. You have to

1 have all of the -- for 35, you have to have 35 and then
2 all of the elements of 34.

3 Q And just to be clear, with respect to the
4 elements, the portion in brackets, I believe you
5 testified yesterday that those are not actually in the
6 claim, that you put those in for our ease of reference,
7 correct?

8 A Yes, that's correct. Anything in brackets
9 like that are text that I've added.

10 Q I'd like to look at 34(b), at least one buyer
11 computer for operation by a user desiring to buy
12 products.

13 MR. BALDAUF: If you could please pull up
14 Appendix B, Page 2, please, Ms. Johnston.

15 If you could please highlight -- or
16 enlarge the very first paragraph on the right side.

17 Q (By Mr. Baldauf) And, Dr. Grimes, we're taking
18 a look at your expert report that you prepared in this
19 case, correct?

20 A Yes, that's correct. This is my -- this is
21 Appendix C from my expert report.

22 Q And this is the portion of your report where
23 you compare the claim elements of Claim 34 of the '314
24 patent to that functionality of the Newegg website that
25 you believe satisfies those limitations, correct?

1 A Yes, that's correct.

2 Q Okay. With respect to the limitation in
3 34(b), at least one buyer computer for operation by a
4 user desiring to buy products, you wrote that a Newegg
5 customer computer, when connected to the Newegg server
6 system, through Newegg's website via the internet
7 becomes a buy computer.

8 So is it your testimony that the customer's
9 computer is the buyer computer?

10 A Yes. It becomes the buyer computer after it
11 connects to the Newegg server system.

12 Q And, again, this computer is supplied by the
13 customer.

14 A Yes. It's the customer's computer, and it
15 becomes a buyer computer, matching this claim
16 limitation, when it connects to the Newegg server
17 system. Then it becomes part of the Newegg server
18 system.

19 Q Now, Claim 34(b) also requires a user desiring
20 to buy products. Is the user in this claim element the
21 customer?

22 A Yes. The claim requires the buyer computer
23 for operation by the user. So the focus of the claim is
24 the buyer computer, and it is the -- the user is the --
25 is the customer, with the exception of the testing

1 situations that I mentioned.

2 Q Does Newegg supply the customer or user?

3 A No. The customer is, you know, people like
4 you and I who want to buy products.

5 Q And we talked about this before. Newegg does
6 not somehow control the customer and force them to log
7 on to their website.

8 A No. No. That's -- that's also not required
9 by the claim.

10 Q But you agree that the customer decides to
11 access the Newegg website by their own free will.

12 A Certainly. Certainly.

13 Q So do you agree with me that it's the customer
14 that satisfies the limitation of a user?

15 A Well, the limitation is for a buyer computer
16 for operation by a user. So the limitation of a buyer
17 computer, the buyer computer is the customer's computer;
18 and when it's connected to the Newegg server, it becomes
19 a buyer computer.

20 Q Right. But I'm asking you about the latter
21 portion of that claim, for operation by a user. Who
22 satisfies that portion? The user?

23 A Well, the buyer can --

24 Q Is that the customer, or is that Newegg?

25 A With the exception of the testing activities,

1 it's the customer that actually does operate the
2 computer.

3 Q Thank you.

4 If I could turn your attention to what you
5 have designated as 34(f). Said buyer computer being
6 programmed to receive a plurality of requests from a
7 user to add a plurality of respective products to a
8 shopping cart in said shopping cart database.

9 Is the cookie stored in the user's computer
10 browser of the Newegg shopping cart?

11 A The cookies stored in the browser contains the
12 contents of the shopping cart, yes. You can think of it
13 as a shopping cart, but it contains the contents of the
14 user shopping cart. It's the products he wants to
15 purchase.

16 Q So is that the shopping cart?

17 A You can think of it that way. I think of it
18 as a cookie representing the contents of the shopping
19 cart.

20 Q Now, I just want to be very clear on this
21 point, because we did talk about this in your
22 deposition. And I'm not sure we're saying something
23 different, but I just want to make sure we're on the
24 same page.

25 If you could please turn to Page 131 of your

1 deposition transcript.

2 Do you have that in front of you, sir?

3 A Yes, I do.

4 Q If you look to Line 11:

5 QUESTION: So you've interpreted a
6 shopping cart to include cookies?

7 ANSWER: The contents of the shopping
8 cart for multiple clicks are stored in a cookie called
9 the Newegg cookie.

10 QUESTION: A moment ago, you referred to
11 that as the shopping cart.

12 ANSWER: Yes, that's the shopping cart.
13 The contents of the shopping cart are stored in the
14 cookie called the Newegg cookie.

15 Q (By Mr. Baldauf) So is it fair to say that
16 you're referring to that cookie as the shopping cart?

17 A Yes, you could say that.

18 Q Okay.

19 A That would be a good way to say it.

20 Q Is there any portion of the '314 patent that
21 describes the shopping cart as being a cookie?

22 A I don't -- I don't recall specifically. I
23 think not. Yeah.

24 Q Would you agree with me that only a
25 server-side shopping cart is disclosed in the '314

1 patent?

2 A Server-side shopping cart. A server-side
3 shopping cart is disclosed.

4 Q Would you agree with me that that's the only
5 type of shopping cart that's disclosed in the '314
6 patent?

7 A I don't recall if it is the only thing, but it
8 could be the only thing. It certainly is disclosed. I
9 recall that, yes.

10 MR. BALDAUF: If we could turn to Page 4
11 of the appendices of Dr. Grimes's report.

12 Q (By Mr. Baldauf) And we're still talking about
13 limitation 34(f).

14 MR. BALDAUF: If you could move it to the
15 other side of the page and the paragraph beginning by
16 selecting. That one. Thank you.

17 Q (By Mr. Baldauf) Sir, you wrote: By
18 selecting, clicking on an ad to cart or download button,
19 a user is requesting to add a selected product to the
20 shopping cart.

21 So this is the request to add the product to
22 the shopping cart?

23 A That is correct. That's what I testified to
24 yesterday.

25 Q Okay. And this is an action taken by the

1 user, correct, the customer?

2 A Yeah. The -- the claim requires that the
3 buyer computer be programmed to receive the request.
4 The request is a mouse click by the user, uh-huh.

5 MR. BALDAUF: If we could please move to
6 the next page.

7 If you could blow up the sentence that
8 says: A user may request to add.

9 Q (By Mr. Baldauf) Okay. Now, here you write:
10 A user may request to add multiple items to
11 the shopping cart by clicking multiple add-to-cart or
12 download buttons.

13 So is it your contention that when the
14 customer clicks the add-to-cart button multiple times,
15 that this is the plurality of requests from the user to
16 add the plurality of products to the shopping cart?

17 A Almost. The -- the requests are generated by
18 the multiple clicks, and those clicks, of course, are
19 performed by the user. And the buyer's computer is
20 programmed to operate on those clicks, basically,
21 receive those requests.

22 Q So the claim requires a plurality of requests
23 from a user to add a plurality of respective products to
24 a shopping cart, correct?

25 A That's how the buyer computer must be

1 programmed to do that, yes.

2 Q Do you agree that a plurality means more than
3 one?

4 A It means two or more, that's correct, yes.

5 Q So is this limitation satisfied if the
6 customer only puts a single item in the shopping cart
7 and then checks out?

8 A No. The claim language is very clear. It has
9 to be programmed to receive a plurality of requests from
10 the user.

11 Q So to --

12 A So there has to be -- the structure has to
13 contain the ability for the user to make multiple
14 requests.

15 Q So to satisfy the system in this claim, the
16 user has to put multiple items in the shopping cart?

17 A That's what I -- that's the evidence I put
18 forward, yes.

19 Q Okay. So let's talk about that instance when
20 the customer puts multiple items in the shopping cart.

21 I believe it was your testimony yesterday that
22 these servers here on the Newegg system constitute the
23 shopping cart database, correct?

24 A No.

25 Q No? I'm sorry. The shopping cart computer.

1 A Yes. The shopping cart database --
2 fortunately, we have different colors, I guess.

3 Q Yeah. It looks like Star Wars.

4 A The shopping cart database is represented by
5 this block here that has --

6 Q Okay.

7 A -- shopping cart DB written underneath it.

8 Q Okay. And both of those are server-side,
9 correct?

10 A Yes, they are. They're both part of the
11 Newegg server system.

12 MR. BALDAUF: So if we could refer to
13 Slide 42 from Dr. Grimes' presentation yesterday.

14 Q (By Mr. Baldauf) So just to -- it should be on
15 the screen in front of you, sir. This is a slide that
16 you had prepared in connection with your direct
17 yesterday, correct?

18 A Yes, that's correct.

19 Q Okay. So if you could walk us through this,
20 please. Can you explain this to us once again? What's
21 happening here?

22 A Certainly. And this relates to 34(f), which
23 we've been --

24 Q Right.

25 A -- which we've been talking about.

1 Q That's what we're discussing.

2 A Right. So 34(f) requires the buyer computer
3 to be programmed to receive requests.

4 So this shows that the buyer computer is
5 programmed. It's the -- the add-to-cart button is what
6 has the html code behind it, if you will, that it's
7 executed when the button is clicked, so the buyer's
8 computer is programmed.

9 When the add-to-cart button is clicked -- in
10 this case, let's assume it's for the first time -- in
11 response to the click, the program -- the buyer computer
12 program running on the browser takes the add-to-cart
13 button, creates a message -- in fact, this is an
14 add-to-cart message, and it contains the product
15 identifier associated with the product right next to the
16 add-to-cart button, the cable, okay?

17 Then it goes to -- that message then goes to
18 the Newegg server system, which is -- which is this
19 server block here (indicates), and then the server
20 system generates a new cookie representing the shopping
21 cart contents or, if you will, the shopping cart --

22 Q Uh-huh.

23 A You can call it that, if you like.

24 Q Well, or like you have.

25 A Yeah. And then sends this cookie containing

1 this content, this product identifier, back to the
2 client computer where it is stored by the browser in the
3 cookie file.

4 Q Okay. So while that's going on, those
5 requests are going back and forth, at no time are they
6 yet going to the shopping cart database, correct?

7 A Not yet, no. That's not the way the Newegg
8 system works.

9 Q Now, the claim itself reads: A plurality of
10 requests from a user to add a plurality of respective
11 products to a shopping cart in a shopping cart database.

12 Would you agree with me that while the
13 customer is adding products --

14 MR. BALDAUF: Can you keep that up,
15 please?

16 Q (By Mr. Baldauf) -- while the product -- while
17 the customer is adding products to a shopping cart,
18 pressing add-to-cart, pressing add-to-cart, but prior to
19 the time they hit checkout, that shopping cart is not in
20 the shopping cart database while the products are being
21 added?

22 A That is correct. The add-to-cart button
23 causes the cookie to be updated with one item or two
24 items or however many times they press it. That cookie
25 representing the shopping cart contents is stored by the

1 browser on the client's computer.

2 Q So it's never in the shopping cart database
3 while the customer is adding the products?

4 A Yes. There are other shopping carts in the
5 shopping cart database but not -- not the one that's
6 currently being used by the customer to collect his
7 products, that's right.

8 Q Okay. And then I believe, based upon your
9 chart that you put together, that the Newegg cookie
10 shopping cart, that only -- the contents only go to the
11 shopping cart database once the customer hits checkout;
12 is that correct?

13 A Yes. That -- clicking checkout, as I
14 testified yesterday, sends -- the browser is programmed
15 to send another message when the button is clicked.

16 So that checkout message goes along with the
17 cookie, and it's received by the server. At that point,
18 the server then takes the information from the cookie
19 and inserts it into -- into the shopping cart database.
20 So that's -- our picture is gone, but that's -- that's
21 the time at which the shopping cart database is, if you
22 will, loaded with the information from the customer's --
23 from the customer's cookie.

24 Q I know --

25 A The cookie that is stored on the customer's

1 website.

2 Q I'm sorry. Were you finished? I'm sorry.

3 And would you agree with me that that happens
4 only once, that all of those contents are sent to the
5 shopping cart database only once when checkout is hit?

6 A Well, it happens every time the checkout
7 button is selected. But if the customer is through
8 shopping, does one checkout operation, then it's -- the
9 database is updated only once.

10 Q Would you agree with me that a request to
11 check out is not a request to add a product to the
12 shopping cart?

13 A That's correct. It's a request to check out.
14 I mean...

15 Q During your testimony yesterday, you talked at
16 length about these claims and the various limitations.
17 I don't recall a discussion, though, about one word in
18 Claim 34(f), and that's respective. I don't believe you
19 talked about that yesterday.

20 That's a word we hear a lot, respective,
21 respectively. Do you agree with me respective means
22 something relating to two or more things, but they're
23 regarded individually?

24 A I have thought about what respective means in
25 this claim -- this claim element, and I believe it

1 represents the relationship between the request and the
2 products.

3 Q My question is just what respectively means.

4 A Respectively?

5 Q Yes.

6 A You know, I haven't really thought about it
7 other than in the context of the claim.

8 Q Okay. Is that not a word you're familiar
9 with?

10 A It's not a word I use, no.

11 Q Okay.

12 A And the important thing is what it means
13 relative to the claim, and that's really all I focused
14 on.

15 Q Okay.

16 A I didn't actually think about what it may mean
17 independent of that, yes.

18 Q Okay. I'd like to now turn to what you have
19 marked as element 34(h).

20 The language to modify said shopping cart in
21 said shopping cart database to reflect said plurality of
22 requests to add said plurality of products to said
23 shopping cart, would you agree with me that plurality
24 means more than one?

25 A Yes. Two or more. We've -- we've already

1 talked about that, uh-huh.

2 Q And as you stated previously, the contents of
3 the shopping cart are only sent bundled together when
4 the checkout button is hit to the database.

5 A Yes, that's correct. The cookie is sent,
6 which contains multiple items.

7 Q Prior to this transfer to the shopping cart
8 database, there is no shopping cart -- filled shopping
9 cart in the shopping cart database, correct?

10 A Nothing that corresponds to the customer's
11 purchase. I mean, the database contains -- I mean,
12 there are other customers, and so it contains their
13 shopping carts, but nothing -- there's no shopping cart
14 in the database that relates to the purchase items that
15 are in the customer's cookie.

16 Q Right. And that's what we're talking about.

17 A Yeah. That's correct, yes, uh-huh.

18 Q So you'll agree that with respect to this
19 customer, prior to the time that they hit checkout, the
20 shopping cart database is empty.

21 A No. It contains the elements from the other
22 customers who are doing checkout.

23 Q Right.

24 A So the database is not empty. There's just no
25 shopping cart in the shopping cart database that

1 corresponds to the cookie, which is what the customer is
2 attempting to do.

3 Q And that was my question.

4 A Okay.

5 Q I'm talking about that specific customer.

6 A Yes. For that specific customer, that's
7 correct. There's no shopping cart in the database until
8 after the checkout button is pressed or clicked.

9 Q Now, with the Court's claim construction,
10 modify the shopping cart means to change, correct?

11 A Yes. Specifically to change an instance of a
12 shopping cart in the shopping cart database.

13 Q To change, to change it.

14 A Modify. To change, I would say, is a fair
15 interpretation of modify.

16 Q So is it your testimony that placing the
17 contents of the shopping cart cookie into the shopping
18 cart for the first time -- into the shopping cart
19 database -- I'm sorry -- for the first time constitutes
20 modifying the shopping cart in the shopping cart
21 database?

22 A It constitutes modifying an instance of the
23 shopping cart in the shopping cart database.

24 Q What do you mean by an instance?

25 A Well, this is based on Mr. Wu's testimony. He

1 described it as a two-step process.

2 First, there's an instance created, which
3 means there has to be some identification of some space
4 in the shopping cart computer database, and that's step
5 one.

6 Step two involves moving the contents of the
7 cookie into that space, which is the shopping cart in
8 the database.

9 So it's a two-step process.

10 Q I believe that first step, from your report,
11 you refer to that as the assigning of the shopping cart
12 ID.

13 A That's the way -- that's the way Mr. Wu
14 described it as step one, yes.

15 Q What is the shopping cart ID?

16 A Well, the shopping cart ID, as best as I
17 understand it, is an identification of some space in the
18 shopping cart database.

19 Q Is the shopping --

20 A It's assigned and allocated to the shopping
21 cart ID.

22 Q In fact, it's a number, is it not? It's a
23 counter. It's a simple number.

24 A Well, it's a -- in computer science terms, we
25 call it an identifier. It's a -- it's a pointer. It's

1 a -- it's a reference to space in the shopping cart
2 database.

3 And you can think of it as a number, but that
4 doesn't give you any idea of the -- of the meaning of
5 the number. The number is an address or a reference
6 into the database.

7 Q Are there any empty fields in this shopping
8 cart identifier that can be populated with information?

9 A No. The identifier is a reference to the
10 space in the database.

11 Q So the shopping cart identifier itself
12 contains no fields that can be changed or modified?

13 A Well, the identifier is a number, which is a
14 reference to the space.

15 Q Is the shopping cart ID a stored
16 representation of a collection of products?

17 A No. That's the construction for a shopping
18 cart --

19 Q Right. So how --

20 A -- not a shopping cart instance.

21 Q So you're saying, to be an instance of a
22 shopping cart, that does not have to conform to the
23 definition the Court gave us for a shopping cart?

24 A The Court gave us a definition of a shopping
25 cart, which I used, which is a...

1 Q Which you used for shopping cart.

2 A Yes.

3 Q And now you're saying that an instance of a
4 shopping cart doesn't have to satisfy the definition of
5 a shopping cart?

6 A Well, an instance is -- refers to the space in
7 the database where the shopping cart contents will go.

8 Q But an instance of a shopping cart. That's
9 what you said.

10 A Yes.

11 Q An instance of a shopping cart.

12 A Yes.

13 Q So --

14 A That's an instance of a shopping cart.

15 Q So the definition of a shopping cart, though,
16 is a stored representation of a collection of products,
17 agreed?

18 A Yes.

19 Q And the shopping cart ID is not a stored
20 representation of a collection of products.

21 A Well, there's a difference between an instance
22 of a shopping cart and a shopping cart. The Court
23 didn't construe an instance of a shopping cart. It used
24 that as a part of the construction for the word modify.
25 So --

1 Q So is it your testimony --

2 MR. ADAMO: Let him finish.

3 MR. BALDAUF: Sorry.

4 MR. ADAMO: Thank you.

5 A So I used the Court's construction of a
6 shopping cart, and then I said, okay, what does modify
7 mean?

8 And the Court said, well, modify means to
9 change an instance of a shopping cart in the shopping
10 cart database.

11 Q (By Mr. Baldauf) So just so I'm clear, in
12 connection with your definition of instance of a
13 shopping cart, you did not use the Court's definition of
14 shopping cart?

15 A I did, because the shopping cart is the
16 destination for where the information goes -- the
17 product information goes, and it's actually not a
18 shopping cart until the information is there, because
19 the shopping cart is a stored representation of
20 products.

21 So it doesn't make any sense to have a
22 shopping cart if it doesn't contain these items, because
23 it doesn't contain a stored representation of products.

24 Q I'll agree with you that I don't think this
25 makes sense, but the definition is very clear. An

1 instance of a shopping cart.

2 MR. ADAMO: Your Honor, objection at this
3 point. They've been through this four times. This is
4 starting to get argumentative.

5 MR. BALDAUF: That's fine. All right.
6 We can move on.

7 THE COURT: All right. Restate your
8 question.

9 MR. BALDAUF: I think I made my point.

10 MR. ADAMO: Thank you.

11 MR. BALDAUF: Thank you. I apologize. I
12 carrying that too far.

13 THE COURT: All right. Question and
14 answer, Counsel.

15 Q (By Mr. Baldauf) Sir, with respect to this
16 functionality in the Newegg website, you know, this idea
17 of modifying the shopping cart in the shopping cart
18 database, have you reviewed the Newegg computer code
19 relating to this functionality?

20 A No, I have not. I relied on Mr. Wu's
21 testimony.

22 Q Have you examined any of the Newegg -- Newegg
23 source code?

24 A Not directly, no.

25 Q Just to step back one second, do you agree

1 with me that the -- while the customer is shopping,
2 it -- the cookie for the shopping cart is being updated
3 in the customer's browser as he's hitting the
4 add-to-cart button, as opposed to in the shopping cart
5 database?

6 A Yes. When a customer clicks the add-to -- I
7 testified about this yesterday. When a customer clicks
8 the add-to-cart button, the html in the buyer computer
9 is programmed to send a message to the server computer.
10 The server computer then returns the -- a cookie --
11 either it's the first edition or second edition, but in
12 either event, it returns a cookie that contains the
13 results of that.

14 And the server computer, you know, knows that
15 cookies are enabled; otherwise, this operation won't
16 succeed. And so it's automatic that the browser stores
17 this -- stores this representation of the shopping cart.

18 MR. BALDAUF: If we could please pull up
19 Page 14 of Exhibit C?

20 And if we could pull up the first two
21 sentences of the first paragraph. Keep going down. The
22 first -- keep going down. Right. Up a little bit.

23 Yeah. That's good right there.

24 Q (By Mr. Baldauf) This comes from your report
25 where you wrote in your report that Newegg's system of

1 modifying the shopping cart in the cookie has the
2 advantage of simplifying database management.

3 What do you mean by that?

4 A Well, there's a -- an operation -- the process
5 of purchasing items and putting them in a shopping cart,
6 the shopping cart information has to be stored
7 somewhere.

8 So the design -- this is under the Doctrine of
9 Equivalents now --

10 Q Right.

11 A -- since we're looking at it here, yeah.

12 So the design alternative that the implementer
13 of an E-commerce system considers is, well, where am I
14 going to store that information? Am I going to store it
15 on the server side --

16 Q Which is what's disclosed in the '314 patent,
17 correct?

18 A That's correct.

19 Q Okay.

20 A And then -- or I'm going to -- am I going to
21 store in it a cookie, which is --

22 Q Which -- which is what Newegg does.

23 A -- which is what the Newegg system does,
24 right.

25 And so -- so this is a design choice.

1 Q Okay.

2 A And if you're going to store it in a cookie,
3 then that's a -- doesn't require any additional
4 resources to hold the contents of the shopping cart on
5 the server side.

6 Q So you're --

7 A So that simplifies -- so if you -- if you
8 reduce the amount of things that the database management
9 system has to do, then that simplifies it.

10 Q Does that save space on Newegg servers?

11 A It would save space on Newegg servers, yes.

12 And it would take -- I mean, the space has to
13 be taken somewhere, so the space is taken up by sending
14 the information to the customer's computer to be stored
15 there.

16 Q Right. So in the Newegg system, space isn't
17 taken up by storing shopping carts during the selection
18 process, correct?

19 A Yeah. Those are the -- those are the
20 tradeoffs of the two design alternatives, yes.

21 Q Is there something that Newegg is sacrificing
22 by choosing this method instead of the server-side
23 method?

24 A Yes, as a matter of fact.

25 Q What is that, sir?

1 A Well, if you -- if you purchase -- you go
2 shopping at the office, and you want to buy two or three
3 things, then they're saved as a cookie on your office
4 computer, because that's the computer you're using at
5 the time, and that's the way -- it's programmed to do
6 that.

7 Then if you go home at night and say, well,
8 gee, you know, I want to add some more things to this,
9 and maybe then buy the items in my shopping cart, the
10 shopping cart isn't there. It's on your computer at the
11 office.

12 So this is -- this is one of the things that's
13 considered, and that's what makes it a design
14 alternative. There are characteristics of each way of
15 implementing the E-commerce system, and this affects the
16 decision on how to implement it.

17 Q So if a designer would select the server-side
18 option disclosed in the '314 patent, would a customer be
19 able to continue shopping from multiple computers?

20 A Yes, they would. That's one of the
21 consequences of -- of having the information on the
22 server.

23 Q I'd like to now turn our attention to the '492
24 patent.

25 I believe you testified yesterday, with

1 respect to Claim 17 of the '492 patent, that it's
2 virtually identical to Claim 34 of the '314 patent that
3 we've just discussed; is that correct?

4 A Yes, that's right. I talked about -- rather
5 than go through all of the elements of the claim, I
6 talked about the differences, yes, that's right.

7 Q And since we just talked about a lot of the
8 things that are in both claims, I'm not going to belabor
9 that point here either.

10 However, with respect to Claim 15, a hypertext
11 statement system, so, again, Claims 41 and 61, these are
12 the asserted claim, they depend upon Claim 15.

13 A Yes, that's correct.

14 Q And if Claim 15 is not infringed, Claims 41
15 and 51 cannot be infringed; is that right?

16 A That's right. Claim 41, of course, includes
17 the text here; but because of this phrase, in accordance
18 with Claim 15, that means it has to also satisfy all of
19 these limitations for Claim 15.

20 That's -- I believe that's what you said, yes.

21 Q Yes. Right.

22 This claim talks about -- it's a hypertext
23 statement system. What is a hypertext link?

24 A Pardon me?

25 Q What is a hypertext link?

1 A A hypertext link is a region on the web page
2 displayed by the browser from the code that comes from
3 the server. And the link refers to an area of the
4 screen that you can click on -- the user can click on.

5 And the computer is programmed to respond to
6 that link and take some action.

7 Typically, it brings up another web page,
8 but -- but that's -- that's a -- an example. Really,
9 it's programmed to take some action.

10 Q Is the use of hypertext a basic function of
11 the worldwide web?

12 A Yes. I have a hard time imagining the
13 worldwide web without hyperlinks.

14 Q Did Open Market invent the use of hypertext
15 links on the web?

16 A No. Those were -- well, actually, the -- the
17 notion of a hyperlink is very early. Comes from a
18 fellow named Ted Nelson, who wrote -- wrote a book about
19 hyperlinks called Computer Literacy or -- I forget
20 exactly the name of it, but -- but it was, you know,
21 decades, decades before Open Market's system. So 10 or
22 20 -- 10 or 20 years.

23 Q This claim also talks about a transaction
24 detail, transaction statement. What is that? What is
25 the transaction detail within 15(f)? Display

1 transaction details, what are those, sir?

2 A Well, they're -- I think, as you -- as you
3 might just take from reading this, they're details about
4 the transaction. The statement document consists of a
5 transaction history, and transaction details would be
6 further information about a transaction.

7 Q What type of information would you expect to
8 be in a transaction detail?

9 A Well, the claim tells us actually what
10 needs -- what, to satisfy the claim, needs to be there.
11 That's the context I used in analyzing this in the
12 claim.

13 But I would expect, you know, additional
14 information, I mean, you know, details or somehow
15 further information. It's not presented by the
16 statement without the detail.

17 Q And these relate to the past transactions what
18 you have previously purchased, how much it costs, that
19 sort of thing?

20 A Yes. Purchase transactions, right.

21 Q Can you tell me how often this hypertext
22 function is used by customers on Newegg's website?

23 MR. ADAMO: Objection. It's outside the
24 of the scope of the direct.

25 THE COURT: Restate the question.

1 MR. BALDAUF: Excuse me, Your Honor. I
2 didn't hear.

3 THE COURT: Restate the question.

4 Q (By Mr. Baldauf) The question was simply: Do
5 you know if, in fact, Newegg customers select or choose
6 the transaction details and, if so, how frequently?

7 THE COURT: Overruled.

8 A I -- actually I don't have any idea. It's the
9 capability of the website -- it's actually a very
10 powerful website; it has lots of capabilities. And all
11 I have direct experience with are the ones I used which
12 were -- I described in my purchase example.

13 So, I mean, I used it, but I really don't have
14 any idea of what frequency it's used.

15 Q (By Mr. Baldauf) Again, this claim, like what
16 we discussed -- discussed previously, requires a client
17 computer for operation by a client user. Again, would
18 you agree with me that it is the customer that supplies
19 the client computer?

20 A Yes. A customer supplies the client computer.
21 As I described yesterday, it is used by the Newegg
22 order -- order history system.

23 Q And with respect to for operation by a client
24 user, again, that's the customer?

25 A Yes, that customer is the one that uses it.

1 The requirement under the claim is for a client
2 computer.

3 Q My focus though --

4 A And it's for operation by the user, but the
5 requirement to satisfy the claim is that there be a
6 client computer, which is part of the Newegg system.
7 It's called the customer in the Newegg diagram.

8 Q Right. I was just reading the entirety of the
9 passage.

10 A Yes.

11 Q For operation by a client user.

12 A That's correct.

13 Let me add one thing.

14 Q Sure.

15 A It's actually used by -- it could be a Newegg
16 computer if they're providing testing of the system.

17 Q Okay. Thank you.

18 A That's really true for all of the claims. I
19 keep forgetting to mention that.

20 Q With respect to testing, do you know how
21 frequently Newegg tests its systems?

22 A Well, not specifically, but in the normal
23 course of doing business and adding features to
24 websites, which I am familiar with, you would really
25 test features before they were launched for customer

1 use. And I have seen some documents produced by Newegg
2 about some of their testing that they have done.

3 Q Uh-huh.

4 A And that's the normal case. You test to make
5 sure that you're not going to end up with lots of, you
6 know, upset customers because something doesn't work
7 quite right the way it was designed.

8 So the purpose of the testing is to ensure
9 that you're going to have smooth, trouble-free operation
10 when people come to use these facilities that you're
11 adding to the website.

12 Q So you believe this is internal Newegg testing
13 that they're operating, if you will, as the customer?

14 A Yes. That's a good way to characterize it.
15 It's Newegg employees with Newegg computers, obviously,
16 acting as customers for purposes of testing.

17 Q So these are not revenue-generating sales;
18 this is all internal to Newegg?

19 A No, they would not generate -- the purpose
20 isn't to generate revenue. The purpose is to make sure
21 the facilities work that are being launched on the
22 website.

23 Q 15(f) there, the client computer being
24 programmed to display the statement document to receive
25 a request from the client user to display transaction

1 details, and so on.

2 Who requests the display of transaction
3 details?

4 A Well, this claim requires that -- a client
5 computer to be programmed. And it has to be programmed
6 to do these things. And once it's been programmed to do
7 that, then it meets this claim requirement. The actual
8 requests, of course, are done by the user clicking --
9 clicking buttons.

10 Q That was my question.

11 I believe you testified yesterday that the
12 client computer runs a browser that is programmed by
13 Newegg. Is that a fair summary of your testimony?

14 A Yes. Generally, claims require two things:
15 Client computer programmed by Newegg and server
16 computers programmed by Newegg. So the client computers
17 are programmed by Newegg, as I testified yesterday.

18 Q And you believe that is satisfied by Newegg
19 sending html pages to the browser of the customer's
20 computer, correct?

21 A Yes. That's the mechanism that the Newegg
22 system uses to control the operation of the -- of the
23 customer computer.

24 Q Okay. In fact, the way this works, is it not
25 the customer computer that pulls or extracts the web

1 page from the Newegg server?

2 A No. The messages go back and forth between
3 the client and the -- and the server computer.
4 The only thing that the customer does, which is not
5 covered by the claims, is to actually connect to the
6 Newegg website. Once they connect to the Newegg
7 website, they get the initial homepage that has the
8 specials and things on it; and, at that point, all of
9 the operation of the browser is controlled by the
10 programming that comes from Newegg.

11 Q And this is subsequent to the customer
12 initially logging -- taking the action of logging onto
13 the Newegg website?

14 A Yes. It's like the customer, you know,
15 deciding to walk into Home Depot. I mean, that's kind
16 of the initial decision that the customer makes. They
17 connect to this website, and they type newegg.com, and
18 then they are connected to the website.

19 Q So after this happens, then you believe that
20 Newegg programs the customer's browser?

21 A Yes. All subsequent actions that take place
22 relative to the website are controlled by the code, html
23 code, that is sent to the browser in response to a
24 request from the client computer.

25 Q Is a browser a computer?

1 A Well, it certainly depends what you think a
2 computer is. I don't recall specifically if the Court
3 construed that. Yes, they did, actually.

4 Q Yes, he did.

5 A Let me review this here.

6 Functional unit that can perform substantial
7 computation, including numerous arithmetic operations or
8 logic operations without human intervention.

9 So the computer -- I'm sorry, what was your
10 question again?

11 Q If a browser is a computer under that
12 definition.

13 A I would say the browser is an application that
14 runs on the computer.

15 Q The browser itself is not a computer, correct?

16 A Well, when someone says go to your computer
17 and buy me a cable, then the distinction between a
18 browser and a computer might get lost. But from a
19 technical standpoint, I think of the browser as an
20 application that runs on a computer.

21 Q Right. And I was just focusing on the Court's
22 construction.

23 A Yes. But the computer is definitely a
24 functional unit that can perform substantial
25 computation, including running -- running a browser.

1 Q Does the '492 patent disclose the sending of
2 instructions to a browser as constituting programming
3 the buyer computer?

4 A Well, the -- the browser receives instructions
5 in two ways. I mean, for example, if you're going to
6 enable cookies or disable cookies, then that's kind of
7 browser-based commands that are independent of what
8 Newegg is doing.

9 But once browsers are enabled, which means you
10 can buy products, at that point the control of the -- of
11 the browser is done, relative to the claims, is done
12 completely by a code that's sent from the Newegg server
13 system.

14 Q My question, though, is specifically, does the
15 '492 patent disclose the sending of instructions to a
16 browser as constituting programming the buyer's
17 computer?

18 A Oh, I'm sorry, I misunderstood your question.
19 The -- the claim language just says that the client
20 computer is programmed, right here for example.

21 So my analysis was, okay, how does the Newegg
22 system work? Does it contain a client computer, which
23 is the second element? And then is, in fact, it
24 programmed to do the things that the claim requires?

25 And the answer is -- was yes. And it does

1 that by sending the html code from the server computer.

2 Q I understand all that. If you would please
3 answer my question.

4 A Oh, I'm sorry.

5 Q My question is very specific.

6 In the '492 patent itself, the specification
7 that the Judge described to us at the onset of this
8 trial where it discusses the operation of the invention,
9 anywhere in there does it disclose the sending of
10 instructions to a browser as constituting programming
11 the buyer computer?

12 A Oh, I'm sorry. I thought you were referring
13 to the claims. You're actually referring to the patent
14 itself.

15 Q Yes, I am.

16 A I apologize.

17 Q That's quite all right.

18 A I misunderstood the context of your question.

19 I don't remember specifically, but a person of
20 ordinary skill in the art reading the specification
21 would understand what a browser would be or could be
22 used and how they work.

23 Q To answer my question, you don't remember?

24 A I don't remember specifically, no. But I do
25 know that it would be within the knowledge of a person

1 of ordinary skill in the art that that's the way
2 browsers work, yeah.

3 Q Does Newegg install browsers on customer
4 computers?

5 A No. I think I testified yesterday that you
6 could have any one of a number of browsers that --
7 sometimes they come as part of your system. When you
8 install Windows, they're just there. And sometimes
9 people say, oh, I want to use this new Firebox browser.
10 You say, oh, okay. So you download that. So those are
11 done by the customer.

12 Q I think we can finally turn our attention to
13 the '639 patent.

14 I don't want to belabor this point, but,
15 again, we can just concentrate on these independent
16 claims, correct?

17 A Certainly. All the claim elements, whether
18 they are in the independent claims or the dependent
19 claims, must be satisfied.

20 MR. BALDAUF: If we can please pull up
21 Exhibit B, Page 1 of the report.

22 Q (By Mr. Baldauf) okay. Looking at this, it's
23 a -- part 1(a) that you've designated -- a method of
24 processing service request from a client to a server.

25 MR. BALDAUF: If we could blow up the

1 first paragraph on the right-hand side, please.

2 Q (By Mr. Baldauf) The second sentence you
3 wrote in the client server model: Client sends service
4 request over communications link to a server.

5 So would you agree with me that it's the
6 client or customer who is sending the requests?

7 A Yes. The html code behind a button, the
8 programming behind a button like we've been talking
9 about -- add-to-cart is a perfectly good example to
10 use -- that code, when it's executed by the browser, is
11 what sends the service request to the server for some
12 action. In this case, you have the cart action. But
13 that's -- that's a description of the client server
14 model. Clients request service; servers provides
15 service.

16 Q And it's the client that requests service?

17 A Yes. Yes.

18 Q If we could move on to what you have marked as
19 1(b), forwarding a service request from the client to
20 the server system.

21 Who forwards the service request from the
22 client to the server system?

23 A Well, there's a -- which claim element is
24 this?

25 Q What you have marked as 1(b).

1 A 1(b), yes.

2 Okay. This forwarding occurs in multiple
3 steps. I mean, it starts with the client; then it's
4 received by elements along the way. For example, it's
5 received by the firewall at the Newegg web system, the
6 server system, and then it's forwarded to this netscaler
7 block that I testified about yesterday, and then it's
8 forwarded from there to some other servers to actually
9 perform the action requested inside the Newegg server
10 system.

11 MR. BALDAUF: If you could please pull up
12 Page 3 to Exhibit B of Dr. Grimes' report.

13 Q (By Mr. Baldauf) Sir, Page 3 of Exhibit B to
14 your report is your explanation of how this claim
15 limitation is satisfied, correct?

16 A Yes, that's correct. This is the -- this
17 is -- what we're looking at here is my detailed
18 analysis. I summarized it yesterday, but these are the
19 details, yes.

20 MR. BALDAUF: Would you be kind enough to
21 blow up the first paragraph on the right side.

22

23 Q (By Mr. Baldauf) You wrote that to satisfy
24 this limitation: Client computer forward send service
25 requests to the Newegg server system when, for example,

1 users click hyperlinks while browsing web pages.

2 Is that accurate? Is that how that limitation
3 is satisfied?

4 A Yes. This is -- client computers forward --
5 that's right. When you click on a hyperlink, the code,
6 the html code behind that link, causes a service request
7 to be sent by the browser.

8 Q So it's the client computer that's forwarding
9 that service request?

10 A Well, the client computer generates the
11 service request. Forwarding sort of means that it's
12 been received somewhere, you know, like forwarding mail,
13 for example. I get mail and I forward it. So someone
14 else sent me the mail, but the person that receives it
15 then does the forwarding operation.

16 So client computers send a service request,
17 and then it's forwarded by other elements in the chain.
18 This is perhaps not very clearly written. But
19 forwarding means receive something and then send it on.

20 Q And you had mentioned the firewall and the
21 netscaler, correct?

22 A Those are two elements. In fact, Mr. Tittel
23 has said that the -- that this claim element is met by
24 virtue of the fact that the netscaler forwards it to the
25 server system. And that's certainly one place that it

1 is forwarded, yes.

2 Q We can let Mr. Tittel testify himself.

3 Could you show me where in your report in this
4 discussion of element 1(b) that you explain that this
5 limitation is satisfied by either forwarding from the
6 firewall or netscaler? I don't -- you can look, but I
7 don't believe it's in your report.

8 A The use of that particular example, which I
9 agree with completely, was first -- the first time I had
10 thought about that was when I read it in Mr. Tittel's
11 report.

12 Q Okay. So would you agree with me that it's
13 not in your report?

14 A I don't believe I went into that level of
15 detail on the issue, particular issue of what exactly it
16 means to forward. I have what is written here.

17 Q And that's it?

18 A Yes.

19 Q And that's that the client computers forward
20 or send service requests to the Newegg server system?

21 A Yes. Well, what I have written here speaks
22 for itself, of course.

23 Q If we could take a look at what you have
24 marked as 1(c) now: Returning a session identifier from
25 the server system to the client, the client storing the

1 session identifier for use in subsequent distinct
2 requests.

3 This includes the language client is storing
4 the session identifier for use in subsequent distinct
5 requests.

6 Is this satisfied by the customer's computer
7 storing the session identifier?

8 A The claim requires that the session identifier
9 be returned from the server system to the client. And
10 then it requires that the client store the session
11 identifier for use in subsequent requests.

12 So it's -- the storing is done by the client,
13 yes.

14 Q And then moving on from that to 1(d):

15 Appending the storage session identifier to
16 each of the subsequent distinct requests.

17 Again, is that done by the customer computer?

18 A Yes. It's controlled by the Newegg system
19 because it sends the html, which causes the browser to
20 actually do that. That's an automatic operation of the
21 browser when cookies are enabled is that the -- in this
22 case the stored session ID is stored in a cookie, and it
23 is automatically appended to requests of the browser.

24 Q But that's done on the customer computer?

25 A Yes. The request is sent from the customer

1 computer, yes.

2 MR. BALDAUF: If you could please pull up
3 Page 6 of Exhibit D to Dr. Grimes' report. If you could
4 pull up the last paragraph, please.

5 Q (By Mr. Baldauf) Dr. Grimes, you wrote in
6 your report that the conventional operation of cookies
7 is that a server system sends a cookie value to a client
8 computer, and the client computer stores the cookie
9 value for use in subsequent requests to that server
10 system.

11 What do you mean by the conventional operation
12 of a cookie?

13 A Well, that's the way all browsers that I know
14 of operate. That's what I meant by conventional is that
15 it's something that is -- is done by -- it's done by all
16 browsers that I know of. Certainly you could use for
17 doing purchases on the Newegg system.

18 MR. BALDAUF: If you could pull up
19 Slide 6 from Dr. Grimes' presentation yesterday.

20 Q (By Mr. Baldauf) Dr. Grimes, this is another
21 slide from your presentation yesterday. Is this what
22 you're referring to as the conventional operation of
23 cookies?

24 A This is a description of the conventional
25 operation of a browser that has cookies enabled, yes.

1 Q Was this invented by Open Market?

2 A No. I think it was invented by Netscape,
3 probably around 1992, as I recall.

4 Q If we could switch gears briefly. Claim 78.
5 Again, this claim, as you testified yesterday, is very
6 similar to Claim 1 that we just discussed, correct?

7 A Yes, that's correct, uh-huh.

8 Q Part A: A method of processing, in a server
9 system, service requests from a client to the server
10 system.

11 Again, are these service requests that are
12 sent by the client or customer to the server system?

13 A Yes. The service requests are from a client,
14 meaning -- meaning a client computer or the buyer
15 computer or the customer computer. Yes, those service
16 requests come from the client.

17 Q And in 78(b): Receiving, from the client, a
18 service request to which a session identifier stored at
19 the client has been appended by the client.

20 Do you agree that it is the client that -- or
21 the client's computer that has appended the stored
22 session identifier?

23 A Yes. The claim requires that they be received
24 from the client. So this is an operation that's done on
25 the server, they receive the messages from the client.

1 And, in fact, yes, that is correct. The
2 identifier stored at the client has been appended by the
3 client. That's the way the browser works.

4 Q We talked a bit -- not we, but one of my
5 associates and you talked a bit at your deposition about
6 sessions, correct?

7 A Undoubtedly, I don't remember. It was most of
8 a year ago. But I'm sure you will remind me of what I
9 said.

10 Q That's why I'm here, right?

11 A That's right.

12 MR. ADAMO: You can bet on it.

13 Q (By Mr. Baldauf) The Court has defined
14 session as a series of requests and responses to perform
15 a complete task or set of tasks between a client and a
16 server system, correct?

17 A In the context of the '639 patent, that is
18 correct, yes.

19 Q And I believe you testified that a task
20 depends upon the request that the server receives and
21 the responses that it provides to the client. Does that
22 sound accurate to you?

23 A Yes. A task is represented by the series of
24 requests and responses.

25 Q Could a session be the sending back of an ID

1 from the server to the customer's computer after
2 authentication?

3 A Well, when you do a logged-in session, which
4 involves authentication by the server, that's
5 actually -- the sending of that cookie and storing it is
6 the beginning of the session.

7 Q Okay.

8 A So that's -- that's -- my analysis shows that
9 that's when the session begins, the logged-in session
10 particularly begins.

11 Q As a task?

12 A Pardon me?

13 Q As a task?

14 A I wouldn't consider that a task, no. That's
15 the beginning point. In other words, you have to begin
16 the session, then the task consists of requests and
17 responses that occur once the session is begun.

18 Q How many?

19 A How many?

20 Q Yes.

21 A Well, at least one set of requests and
22 responses.

23 Q You talked a bit yesterday about this concept
24 of inducement of infringement. Just a couple final
25 questions.

1 Are Newegg's customers responsible for the
2 operation of Newegg servers?

3 A I can't imagine they would be.

4 Q Do Newegg's customers ever supply or operate
5 Newegg's shopping cart computers or shopping cart
6 databases?

7 A The -- the shopping cart system -- the Newegg
8 system, you know, at the data center is operated by --
9 by Newegg employees for sure. And the -- and I talked
10 about the fact that the service send htmls, so in that
11 sense they're controlling the user's computer, but they
12 don't -- the user operates the user's computer.

13 Q Thank you.

14 MR. BALDAUF: Thank you. I pass the
15 witness.

16 THE COURT: All right. Redirect.

17 MR. ADAMO: Redirect, Your Honor?

18 MR. BALDAUF: Yes, redirect.

19 MR. ADAMO: It will be brief.

20 THE COURT: Okay.

21 MR. ADAMO: Your Honor, it will work best
22 if I can stand here by the charts.

23 THE COURT: That will be fine.

24 MR. ADAMO: With my volume voice on.

25 REDIRECT EXAMINATION

1 BY MR. ADAMO:

2 Q You spent a lot of time with Mr. Baldauf on
3 the '314 patent talking about things that the customers
4 did or didn't do, or when they did them or if they did
5 them.

6 What kind of claim is the '314 patent claim,
7 Doctor?

8 A This is called a system claim.

9 Q Okay.

10 A I thought for a moment you were going to
11 delete part of the claim.

12 Q Don't worry about it.

13 Claim 35, is that a system claim?

14 A Yes, it is. In fact, all of the claims that
15 are asserted in this case in the '314 patent are all
16 what are known as system claims. They are claims about
17 the structure of the Newegg system.

18 Q All right. And I think you were making, in
19 your back-and-forth with Mr. Baldauf, you were trying to
20 point out in various of your answers that the claims
21 require computers that are programmed in a certain way;
22 is that correct?

23 A Yes. That's the -- that's the language of the
24 claim, right.

25 Q Okay.

1 A For like the client computer and the server
2 computer.

3 Q Programmed, programmed. I think I've got them
4 all.

5 Claim 34, does any element of Claim 34 require
6 any action on behalf of a customer?

7 A The claim language itself does not. I mean,
8 customers, of course, are involved; but the claim
9 doesn't require the customer action. The claim requires
10 that the computer be programmed.

11 Q All right. Let me be clear about this. So
12 let me ask you again: Do any of the elements of
13 Claims 34, 35, or 51 require any customer action?

14 A No, they do not.

15 Q All right. So besides all the time you spent
16 with Mr. Baldauf talking about what customers did or
17 didn't do with respect to the system claims in the '314
18 patent, you then turned to the '492 and you spent all
19 sorts of time talking with him about what customers did
20 or didn't do with respect to this patent.

21 What kind of claim is this?

22 A All of the asserted claims are also system
23 claims for this patent.

24 Q Those claims, those system claims, the
25 elements in those system claims call out computers that

1 are programmed to do a certain thing?

2 A That's correct, yes.

3 Q And I didn't circle the for operation before.

4 Is for operation a function of a computer?

5 A Yes.

6 Q Not structural?

7 A That's correct.

8 Q All right.

9 A It's what is the purpose, basically.

10 Q Do any of the elements of any of the claims in
11 the '492 patent, Claims 15, 21, 60, 61, do any of them
12 require any action of any type on the part of a
13 customer?

14 A No, they do not.

15 MR. ADAMO: I have nothing further, Your
16 Honor. Thank you.

17 THE COURT: Thank you. Any further
18 recross?

19 MR. BALDAUF: Nothing further, Your
20 Honor.

21 THE COURT: All right. Thank you. You
22 may step down.

23 All right, Ladies and Gentlemen of the
24 Jury, I think we will go ahead and take our morning
25 break at this time. So we will be in recess until

1 10:30. Please remember my instructions. You are
2 excused.

3 COURT SECURITY OFFICER: All rise.
4 (Jury out.)
5 (Recess.)

6 COURT SECURITY OFFICER: All rise.
7 (Jury in.)

8 THE COURT: Please be seated.
9 All right. Who will be your next
10 witness, Mr. Adamo?

11 MR. ADAMO: Your Honor, Soverain Software
12 would call G. Winfield Treese, who goes by Win.

13 THE COURT: He has been sworn, has he
14 not?

15 MR. ADAMO: He has, Your Honor.

16 THE COURT: All right.

17 MR. ADAMO: And he has been out in the
18 hallway until just a minute or two ago --

19 THE COURT: Okay.

20 MR. ADAMO: -- pursuant to the Rule.

21 THE COURT: Thank you.

22 MR. ADAMO: May we begin?

23 THE COURT: Yes, you may.

24 MR. ADAMO: Thank you, Your Honor.

25 G. WINFIELD TREESE, PLAINTIFF'S WITNESS,

1 PREVIOUSLY SWORN

2 DIRECT EXAMINATION

3 BY MR. ADAMO:

4 Q Good morning.

5 A Good morning.

6 Q And would you introduce yourself to the Ladies
7 and Gentlemen of the Jury, please?

8 A My name is George Winfield Treese, but most
9 people call me Win.

10 Q Where did you grow up?

11 A In Shreveport, Louisiana.

12 Q Does your family still live in Shreveport?

13 A My mother lives there part-time.

14 Q Did you go to college?

15 A Yes, I did.

16 Q And where?

17 A At the Massachusetts Institute of Technology.

18 Q That's the Boston area?

19 A In Cambridge, Massachusetts, yes.

20 Q Did you earn a degree from MIT, Mr. Treese?

21 A Yes, I did.

22 Q And what degree did you earn?

23 A A Bachelor of Science in mathematics.

24 Q What year?

25 A That was in 1986.

1 Q Did you work while you were going to MIT?

2 A Yes, I did.

3 Q What type of job did you have?

4 A I was a student employee of MIT's Project

5 Athena.

6 Q All right. What was Project Athena at the

7 time you were a student programmer there?

8 A Athena was a multi-year experiment in the use

9 of workstations, early PCs, in undergraduate education.

10 Q And what specifically did you do as part of

11 your job?

12 A As a student, I did some software development,

13 and I also provided technical support for the user

14 consultants who would help students who had questions

15 about the systems.

16 Q In 1986, after you received your BS in

17 mathematics from MIT, what -- what did you do next?

18 A I went to work on the full-time staff at MIT's

19 Project Athena.

20 Q What was your job title?

21 A I was chief systems engineer.

22 Q All right. Now that you are chief systems

23 engineer and not a student any longer, what were the

24 things that you were responsible for?

25 A I was in -- generally responsible for putting

1 together all of the software components for a -- the
2 complete software environment at Project Athena and
3 making sure that we got those installed on the thousand
4 or so computers that we had.

5 Q Were there any particular projects that you
6 worked on that you remember that you thought were
7 important at the time?

8 A I was also involved with the development of
9 some key components, including the X Windows system,
10 which is like the Windows system that we use on PCs
11 today; the Cerberus Authentication System, which is a
12 security system that's now been incorporated in many
13 systems, including Microsoft Windows; and the Zephron
14 Notification System, which was an early kind of instant
15 messaging system.

16 Q All right. After your employment -- full-time
17 employment at Project Athena, what did you do next for
18 work?

19 A In 1998, I went to work for Digital Equipment
20 Corporation at its research lab in Cambridge.

21 Q What was Digital at that time?

22 A At that time, Digital was the world's second
23 largest computer company.

24 Q All right. The word or the shorthand phrase
25 DEC, D-E-C, gets bounced around quite a bit. Did that

1 have any relationship to Digital that you were working
2 for?

3 A Yes. That was a nickname for Digital.

4 Q Was Digital particularly known for anything
5 important, remarkable in the technology world that you
6 were in at that point?

7 A At that time, Digital was especially
8 well-known for its VAX minicomputers and for computer
9 networking.

10 Q Hard to get a job at Digital at that time,
11 Mr. Treese?

12 A Yes, it was. Digital was quite selective in
13 hiring in engineering, and especially in their research
14 lab, it was very, very choosy.

15 Q What work did you do while you were at
16 Digital?

17 A I worked on several projects, including
18 operating system software, internet firewalls, and
19 security, a lot of the early internet technology at
20 Digital, and sending audio across a network.

21 Q What was Digital's internet firewall that you
22 worked on? What was that project about?

23 A That project was really intended to protect
24 Digital's internal company network from bad things going
25 on on the internet. These days we have firewalls in our

1 houses to protect from bad things on the internet. This
2 was early work to do that.

3 Q You also said something about working on
4 transmitting audio. What was that about?

5 A That was a project to move audio, radio,
6 music, speech, what-have-you, across a computer network.

7 Again, just as today, we can listen to radio
8 stations and music over the internet.

9 Q Ever heard of something called the Alpha
10 processor?

11 A Yes, I have.

12 Q Did you ever work on it?

13 A I worked on software for the Alpha processor.

14 Q And what was the Alpha processor?

15 A Alpha was, at the time, the world's fastest
16 microprocessor, developed by Digital in the early 1990s.

17 Q While you still had this Digital day job, did
18 you feel you had enough time to be doing something else,
19 Mr. Treese?

20 A Yes, I did.

21 Q And what was that something else?

22 A I also attended Harvard University for a
23 graduate degree in computer science.

24 Q While you still had your full-time job?

25 A That's correct.

1 Q Did you get a degree from Harvard?

2 A Yes, I did, a master's degree in computer
3 science.

4 Q You remember the year?

5 A 1992.

6 Q After you got your master's degree from
7 Harvard, did you remain a DEC employee?

8 A Yes, I did.

9 Q Did you think you had more free time? Did you
10 go start doing some other educational program?

11 A I also enrolled in the Ph.D. program in MIT's
12 Department of Computer Science.

13 Q How long were you employed at Digital?

14 A For six years; until 1994.

15 Q Okay. You left Digital. Then where did you
16 go for a job?

17 A I went to a startup company called Open
18 Market.

19 Q Were you employed at Open Market when you
20 invented the technology that was claimed in the three
21 patents that are at issue in this case?

22 A Yes, I was.

23 Q Do you still work?

24 A Yes, I do.

25 Q All right. Where do you work now?

1 A I work now for a consulting company called
2 Serissa Research.

3 Q What is Serissa Research?

4 A Serissa Research is a small consulting
5 company. We do work in internet technology, electronic
6 commerce, high-performance computing, and image
7 processing.

8 Q And what type of people do you work for? I
9 guess what are the company's customers or clients?

10 A We've worked for a variety of companies, both
11 large and small. We've also done some work for Soverain
12 Software and for the U.S. Department of Defense.

13 Q What is it that you do for Soverain?

14 A We have consulted on a range of topics about
15 Open Market's technology, the Transact product, and the
16 intellectual property from Open Market.

17 Q Does Serissa in any way help Soverain service
18 customers for Transact products?

19 A We provide technical support when that's
20 necessary.

21 Q Why do you think you're here today?

22 A I'm here as an inventor on the
23 patents-in-suit.

24 Q Now, the patents-in-suit, you're aware there
25 are three of them, Mr. Treese?

1 A Yes.

2 Q And you're a named inventor on -- currently on
3 all three of the patents?

4 A That's correct.

5 Q And I'm going to use the shorthand numbers for
6 the three patents, the '314, the '492, and the '639.

7 Do you -- are you going to be able to work
8 with those numbers and keep which patents are which
9 straight?

10 A Yes.

11 Q Let's talk a little more about Open Market.
12 What was Open Market?

13 A Open Market was a startup company in 1994. We
14 were setting out to build systems to do business on the
15 internet.

16 Q Do you remember when Open Market first opened
17 its doors?

18 A I believe the company was founded at the end
19 of 1993.

20 Q And when did you join?

21 A In May of 1994.

22 Q Why did you go from what sounded like a pretty
23 good job at DEC to a startup at Open Market?

24 A I was excited about the work that Open Market
25 was doing, about the technology the company would be

1 developing, and it seemed like a terrific opportunity.

2 Q What about the technology that you understood
3 the company was going to be developing, inclined you to
4 leave DEC?

5 A It was an exciting time for the internet and
6 in really broadening the use of the internet for many
7 purposes, and business was new on the internet at that
8 time.

9 Q Well, DEC, at that point, I think you said,
10 being the second largest computer company in the world,
11 weren't they going to work on the worldwide web and the
12 internet? Why didn't you just stay with them and do the
13 work there?

14 A At that time, Digital had many of its -- much
15 of its own networking technology, which had been very
16 good. It was not embracing the internet very rapidly at
17 that time, and this looked like the future to me.

18 Q When you went over to Open Market, did you
19 already know any of the folks who worked there?

20 A Yes, I did.

21 Q Name a couple for us, if you don't mind.

22 A I had worked at Digital with Larry Stewart and
23 Andy Payne.

24 Q Let's focus on Larry Stewart first. What was
25 his position at the time you joined Open Market?

1 A He was the chief technology officer at Open
2 Market.

3 Q And how and when did you first meet him?

4 A I had met Larry some years before when we were
5 both working at Digital.

6 Q And what did you think of the guy?

7 A When I first met him, I thought he was
8 intimidatingly smart.

9 Q Okay. I guess I shouldn't lead with my chin,
10 but I'm going to ask anyway. What is an intimidatingly
11 smart person, Mr. Treese?

12 A You can talk to Larry, describe what you're
13 working on; and before you finish the description, he
14 asks you a question you hadn't thought of, and then he
15 follows it up with a solution to that problem.

16 Q Is he for rent?

17 All right. Now, I've got to ask you a
18 question about personal bias. Is there another reason
19 that you seemed to like Mr. Stewart?

20 A Yes. We're married to sisters.

21 Q So the guy's your brother-in-law.

22 A Yes, he is.

23 Q Okay. And you actually live next door to each
24 other, right?

25 A That is correct.

1 Q Okay. Do you remember about when Mr. Stewart
2 opened -- joined Open Market, Mr. Treese?

3 A I believe that was in April of 1994.

4 Q I think you mentioned Andy Payne?

5 A Yes, I did.

6 Q Was he already at Open Market when you joined?

7 A Yes. He also started in April of '94.

8 Q Did he work at DEC?

9 A Yes, he did.

10 Q Are Payne and Stewart co-inventors with you on
11 the '314 patent and the '492 patent?

12 A Yes, they are.

13 Q And you're co-inventors along with two other
14 individuals, who we'll get to in a little bit, on the
15 '639 patent?

16 A Yes.

17 Q All right.

18 MR. ADAMO: Could we bring up a group
19 photo?

20 Q (By Mr. Adamo) On your monitor and on the
21 screen is a photograph that's entitled Open Market: The
22 Inventors.

23 Do you recognize this?

24 A Yes, I do.

25 Q I very foolishly promised the jury that I

1 would let you tell them what the story behind the
2 dandelions was, so why don't you explain why a whole
3 group of adults is standing in a field holding
4 dandelions.

5 A We went out to take that picture as the
6 company was just really getting started. There was a
7 little grass field right across the street, and I was in
8 the middle of the street from where our first offices
9 were; and the CEO, Shikhar Ghosh, thought it would be
10 interesting to pick the dandelions that were growing all
11 over the place in that grassy patch.

12 Q And seeing he was the boss, everybody just
13 sort of said, I guess we better?

14 A That's exactly right.

15 Q Okay. You didn't think this photograph was
16 going to survive, did you?

17 A No, I did not.

18 Q Okay. Are you in the picture somewhere, Mr.
19 Treese?

20 A Yes, I am. I'm on the far right.

21 Q With the -- I always have to be careful about
22 commenting about hair. How would you describe your
23 hairstyle at that time, Mr. Treese?

24 A That was a little bit longer and curly.

25 Q All right. Now, is your brother-in-law --

1 excuse me -- is Mr. Stewart, the guy who lives next door
2 to you, in the picture somewhere?

3 A Yes, he is. He's just to the -- a little bit
4 close to the middle in the striped black and blue shirt.

5 Q Okay. So he's the smiling guy with, like, the
6 rugby shirt?

7 A Yes.

8 Q And the gentleman who's in the foreground
9 standing between the two of you, who's that?

10 A That's Shikhar Ghosh, the founder and CEO of
11 Open Market.

12 Q Okay. The two ladies who are in the front
13 row, who's the lady in the center, and who's the lady to
14 the left?

15 A Kathy Matthews, our office manager, and on the
16 left, Kim Alley, who worked on marketing for Open
17 Market.

18 Q Okay. The three men that are left in the
19 picture, this guy with glasses who looks like he's sort
20 of hiding in the background, do you know who he is?

21 A That's Andy Payne.

22 Q Okay. All right. When you started at Open
23 Market in May of '94, was Shikhar Ghosh already there?

24 A Yes, he was.

25 Q Now, was he one of the co-founders?

1 A That's correct.

2 Q Who was the other one?

3 A David Gifford.

4 Q Did you know -- I think it's Dr. Gifford --
5 before you started at Open Market?

6 A Yes, I did.

7 Q How?

8 A He was a professor at MIT, and I knew him from
9 my time at MIT.

10 Q Do you happen to know where Dr. Gifford is
11 employed today, if he still is?

12 A He's still a professor at MIT.

13 Q When you joined Open Market, did you have a
14 title originally?

15 A No, I did not.

16 Q Did you get one at some point?

17 A Yes, I did.

18 Q And what title did you get?

19 A Vice president of technology.

20 Q Okay. All right. Let's take down the
21 dandelion picture, and I want to talk to you a little
22 more about what was happening in the 1990s, as far as
23 technology was concerned.

24 Let's focus first on the internet. What was
25 happening with respect to the internet in the early --

1 early 1990s? Things that were important, not just
2 everyday stuff.

3 A There were two key things, I think, that
4 really influenced Open Market.

5 The first was that the internet was open for
6 commercial use. Before that, the use of the internet
7 had been restricted to research and education uses.

8 The second was the invention of the worldwide
9 web.

10 MR. ADAMO: Your Honor, what we're going
11 to do, with the Court's permission, is, I have asked
12 Mr. Gooden -- we've set this demonstrative up. It's a
13 timeline, and we're going to just sort of build the
14 entries --

15 THE COURT: All right.

16 MR. ADAMO: -- as we go along, and then
17 for the record, there will be a complete copy when we're
18 finished.

19 THE COURT: All right.

20 MR. ADAMO: Thank you, Your Honor.

21 Q (By Mr. Adamo) All right. So we've put up on
22 the timeline the two events you just mentioned,
23 Mr. Treese?

24 A Yes.

25 Q What relationship, if any, to online shopping

1 or E-commerce did these two events have?

2 A Well, the first one was that being able to do
3 business on the internet was a key part of then doing
4 the business on the internet. Before, you simply
5 couldn't do it.

6 Q And --

7 A The worldwide --

8 Q Go ahead. I'm sorry.

9 A The worldwide web was important because it
10 made the internet a richer, more interactive tool to use
11 than it had been, and that made it possible to think
12 about a rich shopping experience.

13 Q Okay. Why do you say the worldwide web
14 enabled richer content, if I can phrase it that way?

15 A Before the worldwide web on the internet,
16 almost everything was done with text, off and on small
17 terminals, no pictures, no graphics, very limited
18 capabilities.

19 The web browser and the web servers let us
20 connect things together and display pictures of things
21 that you might want to buy and link those together in
22 interesting ways.

23 Q Okay. Were there any other ways that at the
24 time you thought the capabilities of the worldwide web
25 might facilitate online shopping and E-commerce?

1 A Besides being able to give us the graphical
2 display and make it more interactive, the use of
3 hypertext links in the worldwide web, where you can
4 click on a link and go to the next page in a catalog,
5 find out more information about an item for sale or even
6 select something to buy, were a key part of what the web
7 made it possible for us to do.

8 Q All right. Let's add a few more of the dates
9 that you just mentioned on to the -- on to the timeline.
10 When did Stewart and Payne start working at
11 Open Market again?

12 A That was in April of 1994.

13 Q All right. So the dates of April and May of
14 '94 that are now on the timeline, are they accurate?

15 A Yes, they are.

16 Q And you started in May, so you're now on there
17 as well, correct?

18 A Correct.

19 Q All right. Let's go back to the 1994 events
20 then.

21 At the time you joined Open Market, were there
22 other E-commerce companies at that time that you were
23 aware of?

24 A There were others starting up at about the
25 same time.

1 Q Were you familiar with some of them?

2 A Some of them that I remember from that time
3 included Netscape, a company called First Virtual, and
4 one called CyberCash.

5 Q What did they do?

6 A Netscape set out building the core pieces for
7 the web in general, the web browser and the server
8 software that would be needed for people to use the web
9 for all kinds of applications.

10 First Virtual was working on a system for
11 doing -- for buying things by e-mail that you would get
12 delivered by e-mail. Their favorite example is actually
13 a joke of the day that you could buy for a nickel.

14 And CyberCash was working on developing ways
15 of doing secure payment for credit cards over the
16 internet.

17 Q Okay. How is what you were thinking about or
18 trying to do at Open Market different or planning to be
19 different than what these other companies were already
20 trying to do?

21 A What we set out to do at Open Market was to
22 build the full set of systems that you would need to do
23 business on the internet.

24 That would, of course, include payment; but it
25 would include the presentation of products, like a

1 catalog, for sale, the ability for someone to choose
2 what they wanted to buy or choose what they didn't want
3 to buy, if they changed their mind later, complete the
4 transaction, and then keep track of what they had
5 purchased after the sale. It was really a complete set
6 of things.

7 Q All right. I referred to what Open Market was
8 attempting to do, as far as online shopping was
9 concerned, as a soup-to-nuts system. Is that accurate?

10 A I think that's a good way to describe it.

11 Q Who were the intended buyers and sellers for
12 the system, as Open Market folks viewed it, in mid-1994?

13 A We were building the tools that would
14 primarily be used -- our customers would be businesses.

15 But we thought a lot about all of the users of
16 the system, which would include anyone who was buying
17 something from those sellers, as well as the tools, of
18 course, that the sellers would need to do it.

19 And we wanted that capability to be available
20 to small businesses, as well as the large businesses,
21 and the network to be open to anyone with a network
22 connection to be able to buy things from these sellers.

23 Q Was there any thought in your minds or
24 intention at the time to put the system together so that
25 the small mom-and-pop store in Connecticut on the web

1 would look like Nieman Marcus in Dallas?

2 A That was absolutely something that we had in
3 mind, to enable small businesses to have the same kind
4 of presence on the net.

5 Around that time, there was a cartoon in the
6 New Yorker, two dogs sitting at a computer. One dog
7 says to the other: On the internet, no one knows you're
8 a dog.

9 And that really had a couple of meanings for
10 us. One was that as a seller, you could be a small
11 business there with as big a presence on the network as
12 a large seller did.

13 But also it was true for the buyers, that any
14 buyer was the same to a seller no matter where they came
15 from, no matter what they looked like, how old or young
16 they were, how they were dressed. All buyers looked the
17 same on the internet.

18 Q This -- what's up on the screen right now that
19 we're showing, is this, in fact, the cartoon you were
20 referring to?

21 A Yes, it is.

22 Q All right. Let me ask you now to look in your
23 binder -- and we'll put this up on the system -- at a
24 document that's in evidence as Exhibit P78.

25 Are you familiar with this document,

1 Mr. Treese?

2 A One moment.

3 Q Probably all the way at the end of your
4 binder.

5 A Yes, I am familiar with it.

6 Q This document is entitled on the first page
7 Open Market Store Building Kit Plan. Were you familiar
8 with what Open Market referred to as the Store Building
9 Kit?

10 A Yes, I was.

11 Q And just broadly, can you tell us what it was
12 intended to be?

13 A The Store Building Kit was the set of tools
14 that we were envisioning building for businesses to
15 create their presence on the worldwide web that would
16 enable them to sell products and services on the web.

17 Q All right.

18 MR. ADAMO: Mr. Gooden, would you go down
19 to the bottom of the first page and blow that whole
20 paragraph up? Thank you.

21 Q (By Mr. Adamo) I've highlighted some of the
22 long language that's in the last paragraph, the first
23 page of P78.

24 Mr. Treese, would you just read the
25 highlighted portion out loud for us --

1 A The Store --

2 Q -- please?

3 A -- Building Kit pages will provide a simple,
4 easy-to-use interface to creating a store on the
5 internet. The user input will be simple text with
6 options to upload image files or data files in the case
7 of information providers.

8 Q Is that, in sum or substance, what you-all
9 were trying to do at that time?

10 A Yes, it is.

11 MR. ADAMO: Mr. Gooden, the top of the
12 second page now, please.

13 Same exhibit, Your Honor, P78.

14 Q (By Mr. Adamo) There's another portion of that
15 document that I've asked to be highlighted there. I'll
16 read that one.

17 Store Building Kit is specifically aimed at
18 the small merchant with little computer or internet
19 experience.

20 Does that accurately reflect what your plans
21 were at Open Market in mid-1994?

22 A Yes, it does.

23 Q If you -- excuse me just for a moment.

24 If you look at the top of the first page of
25 the exhibit, Mr. Treese, there's a handwritten date.

1 You've seen that before?

2 A Yes, I have.

3 Q Can you confirm that that date should be read
4 as June 8th, 1994?

5 A That's correct.

6 Q And did you, in fact, see this document on or
7 around that date for the first time?

8 A Yes, I did.

9 MR. ADAMO: First page of the exhibit
10 now, the second paragraph, please, Mr. Gooden, if you
11 would blow that up. Thank you.

12 Q (By Mr. Adamo) Would you read that highlighted
13 portion for us, please, Mr. Treese?

14 A The stores created by the kit will be a series
15 of web hypertext pages supported by a set of Open Market
16 programs for payment, accounting, et cetera.

17 Q Can you explain to the jury with a little more
18 detail what that was about, that particular statement?

19 A What we had in mind was creating on -- on a
20 worldwide web server, a set of pages that would have
21 products for sale, like the pages of a catalog, and then
22 the programs that they would use would let you buy and
23 pay for items, as well as for handling the accounting,
24 the transactions, and keeping track, after you bought
25 things, of what you had bought.

1 Q Was the availability of hypertext links and
2 hypertext pages considered by Open Market at that time
3 as a possible way in which the customer could mimic
4 browsing, that you could -- by the hypertext links, you
5 could sort of go through the site and other sites and
6 look at stuff?

7 A Yes. We planned to use hypertext links
8 extensively for many of the functions for browsing the
9 products for sale, as well as executing the actions that
10 you would need to do.

11 Q Was the focus that you had at the time, the
12 business owner or the person setting up the store? I
13 mean, what about the customer?

14 A When we thought about our customer, that would
15 be the business of setting up the store. In designing
16 the system, we spent a lot of time thinking about both
17 what the business would need, but also what experience
18 the buyers would have, because the software that we were
19 developing would be interacting and working with the
20 buyers as much as the sellers.

21 Q Was it -- would it be fair to say that you
22 were -- as far as the ultimate customer was concerned,
23 you were trying to develop an online system that would
24 make the experience, sitting in front of your computer,
25 like being in a real store?

1 A We wanted to make it as familiar, like being
2 in a store or using a catalog, as we could.

3 MR. ADAMO: Mr. Gooden, if you would go
4 to Page 7, please.

5 Still on Exhibit P78, Your Honor.

6 Would you blow up the bottom portion of
7 that page? Thank you.

8 Q (By Mr. Adamo) All right. I've highlighted
9 part of this page as well, and I'll read it just so it
10 will go a little quicker, Mr. Treese.

11 Quote, a key feature is that this page will
12 serve a, inner quote, shopping cart, close the inner
13 quote, for the customer as they browse/search the store.

14 The customer can refer to what items have been
15 provisionally selected for purchase and can
16 add/change/delete items. Upon submitting the order, the
17 customer will be prompted for payment and shipping
18 information.

19 Can you explain how that statement tied into
20 what you were trying to build in June of 1994, if it
21 does?

22 A What we saw as an important part of the
23 experience for the buyer is, I'd be looking at a catalog
24 page. I'd say, I'd like to buy that shirt. I need to
25 save that information somewhere so I can put it in a

1 shopping cart. Maybe I want to buy two of them, so I
2 can change the quantity.

3 Later I might browse and say, oh, I like that
4 shirt better, so I can delete one item from the shopping
5 cart, add the other one. When I'm done, I go and check
6 out.

7 Q Was this document that we've just been looking
8 at dated in June of 1994 essentially the first statement
9 of the overall system that you were trying to design at
10 Open Market?

11 A I believe that's correct.

12 Q The various ideas that we've just pointed out
13 to the jury and to His Honor, who had those ideas? I
14 mean, how did you come up with them?

15 A The ideas about what we wanted to build came
16 from a lot of discussion back and forth among the
17 members of the original Open Market team to figure out,
18 we need a shopping cart; it has to have these kind of
19 functions; we need to build the tools for the seller,
20 because without those, the seller can't do his work.

21 We were working very closely together with a
22 lot of discussions to generate the ideas that are
23 reflected here.

24 Q I'm going to change the focus a little bit
25 now, Mr. Treese. Now I want to try to have you focus in

1 on the technical problems, to the extent there were
2 technical problems that Open Market had to solve, and
3 forward in 1994, so you could get this system designed
4 and up and functional.

5 Basically, what were the challenges that y'all
6 had to -- had to face to get the system up and running
7 in 1994?

8 A There were quite a few. A couple of the hard
9 ones were how to keep track of the state, the
10 information about what was going on in the transaction,
11 and how to maintain information about the browsing
12 session and the shopping session that the customer had.

13 Q All right. As succinctly as you can, without
14 turning this into a technical discussion, what's state?

15 What was the -- what was -- what was the
16 nature of that problem, just very generally?

17 A State is our shorthand for the set of
18 information that represents what's been going on in a
19 transaction, what items you might want to be buying;
20 that is, a list of items in your shopping cart would be
21 part of the state of a transaction.

22 Q All right. And I think you also used the word
23 session?

24 A Yes.

25 Q What was a session?

1 A A session would be a series of requests in a
2 related session of what you're doing. Browsing through
3 a catalog, choosing items, discarding items would all be
4 part of the same session. A few days later, you might
5 have another session.

6 Q And why was that a technical issue in
7 developing the type of system that you folks were
8 focusing on at Open Market in the mid-1994?

9 A Those were a problem, because the worldwide
10 web, as originally designed, was intentionally designed
11 without state, which has a lot of benefits for some
12 applications, but for the business applications we had
13 in mind, state was absolutely essential.

14 Q Did you and the other people at Open Market
15 solve these state and session problems?

16 A Yes, we did.

17 Q How?

18 A We did it in a -- in a couple of pieces for
19 the state and for sessions.

20 Q All right. Start with the first piece.

21 A For the state, we stored that information on a
22 web server so that there was a database keeping track of
23 the items in your shopping cart, is a good example of
24 the kind of state we needed to have.

25 And then that was actually connected to what

1 you were doing by the session so that you would have a
2 shopping cart for a session.

3 And that was done by attaching some
4 information that would go back and forth between the
5 browser and the server as you browse through -- as you
6 interacted with the shopping cart, and that's what we
7 called a session identifier.

8 Q Now, when you say -- said browser in your last
9 answer, as far as hardware is concerned, are you
10 referring to the client computer or the customer
11 computer?

12 A The browser is software that would be running
13 on the client computer -- that's the technical term --
14 or the customer's PC.

15 Q Do you tend to use the terms interchangeably,
16 Mr. Treese?

17 A Yes.

18 Q All right. You mentioned that you came up
19 with the idea of sending something that you just told us
20 was a session identifier back and forth between the
21 client and the server.

22 Just if you don't mind, tell us a little bit
23 more about the session identifier, please.

24 A At that time, what we did was, every web page
25 has a name called a URL. You can see it in the top bar

1 of a web browser, usually.

2 And to that, we attached an identifier that
3 would be consistent through the session even as you
4 changed pages. And that's how we built the first
5 system.

6 Q Best recollection of when someone at Open
7 Market came up with this solution to this state/session
8 problem?

9 A I believe that was in May of 1994.

10 Q Would you, in your binder, please, look at
11 Exhibit P75 that's already in evidence?

12 MR. ADAMO: And, Mr. Gooden, I guess if
13 you would blow up about the top half of the page. Come
14 down a little more. Keep going. Good. Thank you.

15 Q (By Mr. Adamo) Have you seen this document
16 before, Mr. Treese?

17 A Yes, I have.

18 Q And do you know what the date was that this
19 document was -- on which this document was created?

20 A There's information at the top indicating it
21 was dated May 2nd, 1994.

22 Q And who is the author? Is there information
23 that shows you who the author of the document is?

24 A Yes. It was written by Andy Payne.

25 Q Okay. Does this document in any way show what

1 we were just talking about, about the session ID?

2 A Yes, it does.

3 Q In fact, is that actually -- I've had
4 Mr. Gooden pull up the top portion of the document, but
5 does actually the entire document talk about this point?

6 A Yes, it does.

7 Q Let me just quote it here. It says, quote:
8 We need a way to have some notion of session to carry
9 state on the server for things like browsing catalogs
10 and composing orders.

11 And then it goes on to say: Suppose URLs
12 could have a session ID, et cetera, et cetera.

13 Is that essentially a description of the
14 solution that you guys came up with for the
15 State/session problem?

16 A Yes, it is.

17 Q Now, there were other companies selling things
18 online in the spring and summer of 1994, correct?

19 A I believe there were some, yes.

20 Q Did you have any idea how those companies were
21 dealing with the state/session problem that you folks
22 were wrestling with at the time?

23 A Some of them would actually have you keep
24 track on a piece of paper about what you wanted to buy
25 and fax them an order or call it in after you had looked

1 on the website.

2 We sometimes call this "sneaker net" because
3 it involved someone running around in sneakers to
4 actually handle the order.

5 Q Well, were people actually dealing with the
6 problem or avoiding it?

7 A That was pretty much working around it, just
8 avoiding the problem.

9 Q To your knowledge, at Open Market, were there
10 other ways of maintaining state and session in May of
11 1994, other than the one you had just come up with?

12 A Not that I'm aware of.

13 Q All right. I've asked that the timeline be
14 modified so that we've now added the date of the
15 document we were just looking at, May 2nd of 1994.

16 Is that accurate, Mr. Treese?

17 A Yes, it is.

18 MR. ADAMO: And I believe, Mr. Gooden, we
19 can add another item in, that's the date of the earlier
20 memo, P78, that we just looked at, and I've asked Mr.
21 Gooden to do that.

22 Q (By Mr. Adamo) Is that accurate, Mr. Treese?

23 A Yes, it is.

24 Q All right. How long did it take Open Market
25 to get these ideas into a real live working product?

1 A We built our first system that implemented
2 these through the summer. It took us about five months.

3 Q Do you remember when -- what the name of the
4 first product was?

5 A That was a service we operated called the Open
6 Marketplace.

7 Q Do you remember when that was first made
8 available, when it was launched?

9 A It was launched in October of 1994.

10 MR. ADAMO: Mr. Gooden, can we add that
11 to the timeline?

12 Q (By Mr. Adamo) You started in May; Stewart and
13 Payne were already there in April; and you had a
14 commercial version of at least the Open Marketplace --
15 and we'll get into that in a moment -- in October; is
16 that right?

17 A That's correct.

18 Q Did you guys sleep?

19 A Not very much.

20 Q No. Seriously. Explain to us -- I'm sure
21 everybody here is looking at this and going -- were
22 these problems difficult to solve?

23 A The problems were difficult to solve, and we
24 spent a lot of time early on struggling with them. We
25 talked about them all the time, over lunch, over dinner,

1 in the evenings, on weekends, and came up with a design
2 for what we needed to do, and then we spent a lot of
3 time, 18-hour days, writing the code to implement them
4 to get us to that October launch.

5 Q Would it be fair to say -- and this was not a
6 term that was used back in the day, but, I mean, were
7 you-all essentially working 24/7?

8 A Just about. In fact, the night before we
9 launched the Open Marketplace, Larry and I were there
10 all night putting the finishing touches on it to make it
11 work the next day.

12 Q And because he was your brother-in-law, you
13 had your excuses ready when you went home as to where
14 you had been.

15 Okay. Seriously. I mean, you were pulling
16 all-nighters and things like that?

17 A We did that, yes.

18 Q All right. Tell us what Open Marketplace was.

19 A The Open Marketplace was like an online
20 shopping mall operated by Open Market so that the
21 sellers would create their stores and that they would be
22 served up on computers that Open Market operated for
23 them, and they would pay the Open Market for doing that.

24 Q Okay. Who used the Open Marketplace system?

25 A Some customers right around that time included

1 Intuit Software, a company called Kutters Cheese, and
2 soon around that time, Mead Data Central.

3 Q Is that the outfit that's now LexisNexis?

4 A That's correct.

5 Q On the box on the timeline, there's a word
6 Transact after launch of Open Marketplace. Could you
7 tell us what Transact was or is, Mr. Treese?

8 A Transact was the product version that we
9 eventually developed out of what we had built for the
10 Open Marketplace. It was a product that a company could
11 buy and operate themselves with the same kind of
12 functions.

13 Q During October of 1994 when you launched Open
14 Marketplace, was anything else going on at Open Market
15 that sticks in your memory?

16 A Yes, there was.

17 Q What?

18 A We filed the first patent application for the
19 '314 patent.

20 MR. ADAMO: Mr. Gooden, would you put
21 that on?

22 Q (By Mr. Adamo) That was filed October 24th of
23 1994?

24 A Yes.

25 Q If you would just confirm that. Look at Tab 1

1 in your -- in your binder. You have to flip to the back
2 of the first page, and you see that's a copy of the '314
3 patent?

4 A Yes.

5 Q It does, in fact, show it was filed October
6 24th of 1994?

7 A Yes.

8 Q The '492 patent, are you familiar with that?

9 A Yes, I am.

10 Q Do you understand that the '492 patent is
11 related to the '314 patent?

12 A Yes.

13 Q What do you understand the nature of the
14 relationship to be?

15 A '492 is a continuation of '314.

16 Q And what do you understand that means?

17 A That means that it's an additional set of
18 claims about the invention based on the same
19 specification as the '314 patent.

20 Q Does the '492 patent specifically claim or
21 discuss the use of hypertext links, as you recall it?

22 A Yes, it does.

23 Q And is that what we talked about earlier this
24 after -- this morning still when we looked at the Store
25 Builder Kit document, P78?

1 A That's correct.

2 Q Did the Open Marketplace and eventually the
3 Transact systems use hypertext links?

4 A Yes, they did.

5 Q How?

6 A They used -- hypertext link is used in lots of
7 ways. Part of it was browsing through the catalogs, the
8 items for sale.

9 One of the things was, if you were ready to
10 put something in your shopping cart, you would click on
11 a hypertext link, and that would actually instruct the
12 server to put the item into the shopping cart.

13 Editing the shopping cart was done in that
14 way.

15 And also, after you had purchased several
16 items, you could go to a web page about your account and
17 see a list of the items you had made. You would get to
18 that page with a link. On that page would be links to
19 details about those transactions and usually links back
20 to the actual product pages, if you wanted to go back to
21 those for reference.

22 Q All right. I want to direct your attention a
23 little more now to the third patent, the '639 patent.

24 Are all of the inventors on that patent also
25 Open Market employees?

1 A Yes.

2 Q Tom Levergood and Steve Morris are also named
3 on that patent besides -- currently named on that patent
4 besides yourself, Payne, and Stewart, correct?

5 A That's correct.

6 Q Where did Mr. Lever -- excuse me --
7 Mr. Levergood work before he worked at Open Market?

8 A He had also been at Digital.

9 Q And what about Steve Morris?

10 A Steve had also worked at Digital.

11 Q Generally, in your own words, can you tell us
12 what the invention of the '639 patent was?

13 A The '639 patent is really about session
14 identifiers.

15 Q Is that the same session identifier you just
16 described to us a few minutes ago?

17 A Yes.

18 Q Would you look at Tab 3 in your binder,
19 please?

20 Do you see the filing date for the '639
21 patent?

22 A Yes.

23 Q And when was the actual application that
24 turned into the '639 patent filed?

25 A January 12th, 1998.

1 Q All right. Now, just below that date, at Line
2 63, there's another date and patent identified. Do you
3 see that?

4 A Yes.

5 Q And it says continuation of Application Number
6 dot-dot-dot, filed on June 7th, 1995, now Patent No.
7 5708780. Do you see that as well?

8 A Yes.

9 Q Is the '780 patent in some way related to the
10 '639?

11 A The '639 patent is a continuation of the '780
12 patent.

13 Q The '780 patent was, according to the face of
14 the patent, was filed January 7th, 1995?

15 A June 7th, 1995.

16 Q I'm sorry. That's correct. Thank you.

17 All right. When these patents started to
18 issue -- when did the '314 patent issue?

19 A The '314 issued in early 1998, I believe.

20 Q Do you remember when '780 issued? If you do,
21 fine; if you don't.

22 A It was around the same time.

23 Q Actually, if you look at Tab 6 in your binder
24 you will see the '780 patent.

25 Can you tell us when it issued?

1 A Issued January 13th, 1998.

2 Q When these patents started to issue, was that
3 a big deal for Open Market?

4 A Yes, it was.

5 Q Did you-all do anything to tell the world
6 about this or mark the event in some way?

7 A Yes, we did. We issued a press release. We
8 briefed the press; and we also briefed press and
9 analysts who were coming to Open Market headquarters for
10 a meeting.

11 Q To the best of your knowledge, did your press
12 release get picked up by anybody?

13 A Yes, it did.

14 Q Would you look at Exhibit 45, please, in your
15 binder?

16 Is that an issue of the Wall Street Journal
17 from March of 1998 that has an item in it talking about
18 Open Market saying it will receive soft -- internet
19 commerce software patents?

20 A Yes, it is.

21 Q After the patents issued, what did Open Market
22 do business-wise?

23 A Well, the first thing is we continued to focus
24 on the software products business that we had been
25 building. We added to that some expiration of licensing

1 opportunities for the patents.

2 Q How did that go?

3 A Not very well.

4 Q All right. What happened when your initial
5 attempts to license the patents didn't go so well? What
6 did you do next?

7 A The next thing was we brought in an outside
8 firm to help us work out the licensing strategy and
9 focus a bit better on how to do that.

10 Q Did you do anything else?

11 A Eventually we decided that without litigation
12 the licensing program would not be successful, and we
13 filed a lawsuit against a company called Intershop.

14 Q Did you do anything else in regard to
15 enforcing the patents in aid of the licensing program?
16 Did you -- see if you remember, Mr. Treese. If you
17 don't, you don't. Did the company buy some sort of
18 policy from someone to assist in the enforcement?

19 A As -- as part of the program we had, we
20 arranged for a complicated insurance policy that would
21 help fund litigation and licensing program and would be
22 paid back based on the proceeds from that.

23 Q Go back and focus a little on the products
24 again. You said that Open Market launched Open
25 Marketplace in October of 1994?

1 A Yes.

2 Q And you said that Open Market later launched
3 Transact. And Transact again was what?

4 A Transact was the software products that came
5 out of our work on the Open Marketplace.

6 Q And Transact was first sold when?

7 A That was in -- around May of 1996.

8 Q What else was happening in Open Market in
9 1996?

10 A Around May of 1996 was also when Open Market
11 went public.

12 Q Let's talk about licenses for a moment.

13 Did Open Market offer only one type of license
14 with respect to Transact?

15 A There was more than one license type.

16 Q Can you -- best recollection, can you describe
17 the types of licenses?

18 A There were at least two. One was for large
19 companies -- we called it the enterprise license -- who
20 would buy the software and operate it themselves. The
21 other was a commerce service provider license for
22 companies who wanted to provide services to small and
23 medium-sized businesses, who would be operating much as
24 what we talked about the Open Marketplace. Only those
25 companies would operate it instead of Open Market.

1 Q Mr. Treese, I think I've just finally figured
2 out what all the popping has been. You've got an
3 extremely powerful voice. If you could tilt the
4 microphone a little bit off center and maybe drop your
5 voice just a tad. Are you a little nervous?

6 A A little bit.

7 Q Okay. You're among friends -- at least I'm
8 your friend. Try not to boom it out so much, because
9 the popping is sort of making us all -- everybody's been
10 looking around the room trying the figure out where it's
11 been coming from.

12 All right. Let's go back to talking about the
13 licenses.

14 In the customer service provider licenses, do
15 you remember any of Open Market's customers that had
16 those licenses?

17 A Those companies included AT&T, MCI, Sprint,
18 First Union National Bank. At the time, it was about 11
19 of the world's largest 15 phone companies.

20 Q Did Open Market promote the fact that it had
21 customers like AT&T?

22 A Yes, we did.

23 Q How?

24 A We would issue press releases and
25 announcements about them.

1 Q Let's go back to the other style of license,
2 the corporate customer license. Do you recall who any
3 of Open Market's corporate customers were?

4 A Corporate customers included companies like
5 Disney; 3Com; the Tribune Company, which owns The
6 Chicago Tribune; and other media properties; Business
7 Week; Time Warner for its magazines; McGraw-Hill;
8 business Week; companies like that.

9 Q Best of your recollection, do you remember
10 what a typical -- typical price for a basic corporate
11 customer license to Transact was, best recollection?

12 A I believe that was in the range of \$125,000 to
13 \$250,000.

14 Q Were there any additional costs to that
15 license that you are aware of?

16 A Yes, there typically would be.

17 Q And can you tell us what they -- what the
18 nature of those costs were?

19 A Those costs would include installation,
20 services, annual software maintenance for updates and
21 bug fixes, and things like that. And often some
22 customization and integration that would make it work
23 with other software that the company had.

24 Q Bug -- bug fixes. That basically in English
25 means that there's something wrong with the program that

1 needs to be fixed?

2 A That's correct.

3 Q About how much did the customization cost for
4 the customer corporate licenses run? Again, best
5 recollection and personal knowledge.

6 A Those could range from, depending on the
7 complexity of what had to be done, from \$50,000 to
8 several hundred thousand dollars.

9 Q Did corporate customer licenses frequently
10 involve customization, to the best of your knowledge?

11 A Yes, they did.

12 Q You also mentioned some annual service
13 charges. What do you recall being the range of annual
14 service charges for corporate customer licenses?

15 A I -- best of my recollection, the service
16 charges -- the annual maintenance cost was around 15 to
17 20 percent of the original license price.

18 Q Go back now to the other style of license, the
19 CSP style. Did that type of license have annual service
20 charges?

21 A Yes, it did.

22 Q Did that type of license have customization
23 costs?

24 A It could, yes.

25 Q Again, best recollection, something you knew

1 from the job directly, what was the general price range
2 for a commerce service provider license for Transact?

3 A For Transact, the commerce service provider
4 licenses could range from \$250,000 to over a million
5 dollars.

6 Q Why that -- sounding like rather extreme
7 spread in price?

8 A Part of the licensing structure for the
9 commerce service providers depended upon the number of
10 merchants or sellers they expected to have. There were
11 some fees associated with those numbers.

12 Q Did Open Market ever use or have a trademark?

13 A Yes, we did.

14 Q What was one of the trademarks, or as many of
15 them as you can remember?

16 A One of them was We Are Internet Commerce.

17 Q How did you pick that one?

18 A That we chose to show the full range of
19 software that we were providing, not just a piece of the
20 internet commerce software puzzle, but the full range of
21 software that we had.

22 Q Is internet market still around -- I'm sorry,
23 is Open Market still around today?

24 A No, it's not.

25 Q Where did it go? What happened?

1 A It was acquired by a company called Divine in
2 2001.

3 Q And it no longer exists?

4 A And Divine ran into trouble during the dot-com
5 bust.

6 Q Transact. What about the Transact product?
7 Is it still around today?

8 A The Transact product is still around today.

9 Q People still using it, to the best of your
10 knowledge?

11 A Yes, they do.

12 Q Last few questions.

13 How do you feel about the patented inventions
14 that are represented by all those grants from the United
15 States Government?

16 A I'm proud of it.

17 Q Why?

18 A First of all, as an engineer, we have a
19 technical challenge to solve those problems. And that
20 was part of the reward for that.

21 Secondly, it was the core technology that we
22 needed to build a growing software business at that time
23 in an explosion of doing business on the network.

24 And the third, that work and the work at Open
25 Market beyond that, influenced the evolution of doing

1 business and the software that's used for it on the
2 internet.

3 MR. ADAMO: Thank you, Your Honor. I
4 have nothing further. I pass the witness.

5 THE COURT: Thank you. Cross.

6 CROSS-EXAMINATION

7 BY MR. HANSON:

8 Q Good morning, Mr. Treese. It's good to see
9 you again. I'm sure you remember that I met you on a
10 rainy day in Boston and asked you a number of questions
11 at your deposition.

12 A Good morning, Mr. Hanson.

13 Q Nice to see you again.

14 And at your deposition you answered those
15 questions under oath; isn't that right?

16 A Yes.

17 Q And that deposition was transcribed and you
18 read it and signed it?

19 A Yes.

20 Q Thank you.

21 And we can rely upon that then, can't we?

22 A Yes.

23 Q Yes. Mr. Treese --

24 MR. HANSON: I wonder if we could bring
25 up that screen that showed the pictures of the various

1 people at Open Market. Is that possible?

2 MR. ADAMO: Casey. Oh, you don't have
3 control of it.

4 Q (By Mr. Hanson) Mr. Treese, you perhaps --
5 there it is.

6 There are two other individuals in that
7 picture that you didn't mention. Just -- to skip over
8 them and not tell us who they are, it just has me too
9 curious. I have to ask that question.

10 A Yes. The gentleman with the mustache --

11 Q Yes.

12 A -- is David Gifford.

13 Q That's David Gifford. Okay.

14 A And the gentleman right next to him on the
15 other side from Andy is David Mackie.

16 Q Mackie. David Mackie. Thank you.

17 Now, I know you brought out in your direct
18 testimony that both you, Dr. Stewart, and Mr. Payne all
19 worked at the Cambridge research center of the Digital
20 Equipment Corporation, which we've been referring to as
21 DEC; is that right?

22 A That's correct.

23 Q And you worked together at the same location;
24 is that right?

25 A That's correct.

1 Q And I think you told us that one of the things
2 that you did while you were at DEC was to investigate
3 and work with internet projects; isn't that correct?

4 A That's correct.

5 Q And in that regard you had become familiar
6 with the tools of the internet, had you not?

7 A Yes, I had.

8 Q And could we characterize the tools of the
9 internet as things like html and http?

10 A Those were some of the tools.

11 Q And TCP/IP?

12 A Yes.

13 Q And html is the language that's used for
14 coding web pages; is that correct?

15 A Yes, it is.

16 Q And http is the protocol or the rules for
17 sending messages back and forth between a browser and a
18 server?

19 A Yes, it is.

20 Q And you were familiar with those at the time
21 you joined Open Market?

22 A That's correct.

23 Q And so were probably the other individuals:
24 David Mackie and Dr. Stewart?

25 A Yes.

1 Q Now, I would like to fill in a little gap in
2 your timeline.

3 MR. HANSON: I wonder if we could bring
4 that full timeline back up on the screen.

5 Q (By Mr. Hanson) Now, I see there is a little
6 gap there between the introduction of the worldwide web
7 and -- and April and May when Dr. Stewart and you and
8 Andy Payne began working on your project. And I'd like
9 to see if there isn't something that ought to be filled
10 in that gap, in particular: Isn't it a fact that the
11 mosaic browser --

12 MR. ADAMO: Objection, Your Honor. This
13 is outside the scope of the direct. And it sounds to me
14 as if we're going to go into their case-in-chief.

15 They've asked him to be held over. We
16 have an agreement between counsel that we're not jumping
17 out of each other's cases. I'm not trying to keep the
18 information out of the record, but this is not the right
19 time. This sounds like it's going into invalidity.

20 THE COURT: Counsel, are you going into
21 invalidity at this point?

22 MR. HANSON: I'm trying the fill in the
23 timeline. We have in mind to ask the witness to be held
24 over for our case so that we can ask questions --

25 THE COURT: He's indicated that they

1 will -- he has indicated that they will be available --
2 he will be available during your case.

3 MR. HANSON: He has just done that, sir?

4 THE COURT: Yes.

5 MR. ADAMO: I have done that before, Your
6 Honor, but now I'm doing it in open court, yes.

7 Absolutely, he will be here.

8 MR. HANSON: Thank you.

9 Well, then we can cover some other
10 things. It's hard to see how this is -- we will go on.

11 THE COURT: Thank you, Your Honor.

12 Q (By Mr. Hanson) So, now, when you joined Open
13 Market in May, there was a group that was working
14 together that involved both -- both Stewart and Payne
15 and yourself, and didn't David Mackie also work with
16 you?

17 A Yes, he did.

18 Q And what was his role while you were working
19 over that summer to develop the Open Marketplace?

20 A David Mackie worked on the development of the
21 store builder tools that a merchant would use to create
22 storefronts.

23 Q And, in fact, isn't a good portion of the code
24 that Mr. Mackie wrote attached as an appendix to the
25 application for the '314 patent?

1 A I believe that all of the code that Open
2 Market had at that time was attached.

3 Q And originally isn't it true that Mr. Mackie
4 was named as an inventor of the '314 patent?

5 A That's correct.

6 Q And then at sometime later, you were replaced
7 as the inventor in place of Mr. Mackie?

8 A That's correct.

9 Q And what was the circumstances for that?

10 A During the preparation for the litigation
11 against Intershop, in a review of the inventorship, the
12 attorneys determined that the inventorship should be
13 changed.

14 Q Now, were you aware of any existing
15 competition for the Open Marketplace in October of 1994?

16 A I -- it's hard to say competition because
17 the -- we were not competing in sales situations with
18 anyone else.

19 Q Were you competing with the CompuServe Mall?

20 A Not to my knowledge.

21 Q Why do you say you were not competing with the
22 CompuServe Mall?

23 A The focus of our business on the internet and
24 discussions, at least that I knew about, with customers
25 were for selling on the internet not on selling on the

1 CompuServe Mall.

2 Q But you were familiar with the operation of
3 the CompuServe Mall, were you not, during that summer
4 period while you were working to develop the Open
5 Marketplace?

6 A I knew that it existed.

7 Q Had you logged on and investigated it at all?

8 A I had not.

9 Q Had anybody else at Open Market?

10 A I don't know that anyone had logged onto
11 investigate the mall.

12 Q Now, I think you told us at the time of your
13 deposition that there was a rather loose organization
14 there at Open Market over that summer period. I think
15 you indicated that Dr. Stewart was more or less in
16 charge, but that various of you had different jobs and
17 different roles; is that correct?

18 A As engineers, we were working on different
19 parts of the development work, yes.

20 Q Right. And you just explained what David
21 Mackie was working on. What was Andrew Payne working
22 on?

23 A To the best of my recollection, Andy was
24 working on the change we needed for the web server
25 software and the implementation of some of the functions

1 we needed to do for Transact -- for the Open
2 Marketplace.

3 Q What was Dr. Payne working on -- Dr. Stewart
4 working on?

5 A Dr. Stewart was working on the -- on other
6 aspects of the Open Marketplace software, including the
7 database management.

8 Q And what were you working on?

9 A I was working on some of the functionality
10 required for the Open Marketplace, and also spent a lot
11 of time investigating the security software that was
12 going to be important for making it possible to do
13 secure transactions on the internet.

14 Q Well, I believe you explained to us at your
15 deposition that secure transactions would be a
16 transaction to which information was encrypted before it
17 was passed back and forth on the internet; is that
18 correct?

19 A That would be one way of providing secure
20 transactions.

21 Q What other way would there be?

22 A We also arranged for providing credit card
23 information that did not go across the internet at all.

24 Q Oh, you would have to pick up a telephone and
25 call in; is that --

1 A Yes.

2 Q That's the way.

3 So, there was no -- there was no way at the
4 time the Open Marketplace was put into place and
5 operated to transmit credit cards over the internet from
6 the customer to the merchant that was supported by Open
7 Marketplace?

8 A There was not a method without using a web
9 browser.

10 Q And so your -- there was not a way to use the
11 web browser, and that's the way most people today
12 purchase things over the internet; is that not correct?

13 A Those transmissions were not encrypted at that
14 time.

15 Q Right. And you say there was not -- you could
16 do it over the internet, but was that by having some
17 sort of a secure e-mail?

18 A That's correct.

19 Q And was that called PGP or something like
20 that?

21 A Yes. PGP stood for pretty good privacy.

22 Q Okay. But one would have to log off, would
23 they not, log off of the Open Marketplace Mall and then
24 get on the internet and send an e-mail to transmit the
25 credit card?

1 A You would have to switch to use an e-mail to
2 send the credit card number in that way.

3 Q And then you would have to install a pretty
4 good -- I'm sorry, I forgot it already.

5 A Pretty good privacy.

6 Q Pretty good privacy.

7 A Yes, you would.

8 Q So really, as a practical matter, at the time
9 the Open Marketplace was put into action, it wasn't
10 practical to use it as a customer, because you'd have to
11 either pick up a telephone or you'd have to use an
12 e-mail to transmit your credit card?

13 A The credit card number could be transmitted
14 across the internet; it would not be encrypted.

15 Q And isn't it a fact that it would be pretty
16 unwise to credit -- to transmit a credit card across the
17 internet not encrypted?

18 A Certainly that's true today.

19 Q Eventually there was a technology for
20 transmitting encrypted credit card information across
21 the internet, wasn't there?

22 A Yes, there was.

23 Q And I believe you told us at your deposition
24 that that was called SSL or what, TLS?

25 A That's correct.

1 Q And that was technology that was developed by
2 Netscape?

3 A The original SSL technology was developed at
4 Netscape.

5 Q Now, I have a few questions.

6 Did you -- did you participate in the
7 preparation of the patent application for the 39 -- '314
8 patent?

9 A No, I did not.

10 Q Did you read it before it was filed?

11 A Not to my recollection.

12 Q So you never had any objection to how it was
13 prepared or any input into how it was prepared?

14 A That's correct.

15 MR. HANSON: Maybe we could bring
16 Plaintiff's Exhibit 1 up on the screen, and particularly
17 Column 10. And we could highlight the second paragraph
18 in the right-hand column. And just blow that up a
19 little bit, please.

20 Q (By Mr. Hanson) Now, there are a number of
21 appendices that were attached to the patent application
22 when it was filed.

23 Did you have any part in deciding which
24 appendices should be attached to the patent application?

25 A No, I did not.

1 Q Did you know that appendices were attached to
2 the patent application?

3 A I was not familiar with the contents of the
4 application at that time.

5 Q Did you ever come to understand that there
6 were appendices attached to the patent application?

7 A Yes, I did.

8 Q And did you come to know the subject matter
9 that was contained in those appendices?

10 A At least in some of it.

11 MR. HANSON: Your Honor, if I can step
12 over here and get my book.

13 THE COURT: Yes.

14 Q (By Mr. Hanson) Do you have a book in front
15 of you? Do you just have the book that your...

16 Now I ask you to turn to -- the tab which is
17 marked 31(a), which is part of Defendant's Exhibit 31.
18 And I ask you if you have seen that document which is
19 labeled Appendix A?

20 A I don't remember if I've seen this particular
21 document.

22 Q Well, please look at the next tab, which is
23 Appendix B. Have you seen that document?

24 A I don't remember if I've seen that particular
25 document before.

1 Q Are you familiar with the mosaic browser?

2 A Yes, I am.

3 Q Look at Appendix C. Have you seen that
4 document before?

5 A I don't recall seeing this document.

6 Q Finally, I will ask you to look at Appendix D?

7 A B or D?

8 Q D as in David.

9 Have you seen that document before?

10 A I have not.

11 Q So it appears that you have not seen four --
12 three of the four appendices that were attached to the
13 application for the '314 patent application?

14 A That's correct.

15 Q Now, you had some comments about DEC's
16 interest in the internet. And isn't it a fact that the
17 Cambridge research center was not the only research
18 center maintained by DEC?

19 A That is correct.

20 Q And, in fact, they had one called the Network
21 Systems Laboratory out in Palo Alto, California.

22 MR. ADAMO: Objection. He's going into
23 invalidity now. No two ways about it. I just opened
24 the binder -- and I'm not going to identify what this is
25 because, as Your Honor I'm sure well remembers, there's

1 a tremendous issue still pending before the Court about
2 this particular document. That's the center where this
3 document came from that he's just asking him about.

4 THE COURT: Response?

5 MR. HANSON: Yes, Your Honor. I haven't
6 asked any questions about this document. I've asked
7 about another research center maintained by DEC. And I
8 was going to ask him questions about what that research
9 center did.

10 Now, we can take the document up during
11 the time when we call him back.

12 THE COURT: Okay.

13 MR. ADAMO: Thank you, Your Honor.

14 Q (By Mr. Hanson) All right. You told us when
15 Messrs. Mackie, Stewart, Payne, Treese, Morris, and
16 Levergood arrived at Open Market. Can you tell us how
17 long they stayed and when they left? How long did David
18 Mackie stay with Open Market?

19 A I don't recall.

20 Q How long did Dr. Stewart stay with Open
21 Market?

22 A Dr. Stewart left around the end of 2000.

23 Q And when did you leave?

24 A Also at the end of 2000.

25 Q And when did Mr. Payne leave?

1 A I don't recall precisely.

2 Q When did Mr. Morris leave?

3 A I don't recall.

4 Q And when did -- how about Mr. Levergood?

5 A I don't recall.

6 Q And because you left, you never worked for
7 Divine Ventures; is that correct?

8 A I was never employed by Divine.

9 Q And did you ever have any kind of consulting
10 contract with Divine?

11 A I had a consulting arrangement with Open
12 Market that I believe survived the acquisition. I don't
13 recall any work done after the acquisition, to the best
14 of my recollection.

15 Q Did you do work for Open Market after 2000
16 prior to the Divine acquisition?

17 A I believe so, yes.

18 Q And what kind of work was that?

19 A That was fixing some problems with a software
20 that I had worked on that a customer urgently needed
21 fixed.

22 Q Do you know whether Dr. Stewart ever did any
23 work for Divine Ventures?

24 A Not to my knowledge.

25 Q Now, I believe you said you had some sort of

1 consulting arrangement with Soverain; is that correct?

2 A That's correct.

3 Q Can you tell us how frequently you performed
4 any services with regard to the Transact software under
5 that settlement -- under that contract?

6 A From time to time.

7 Q And from time to time means what? Once?
8 Twice?

9 A A few times.

10 Q A few times. That mean three times or --

11 A I -- more than three, less than ten.

12 Q And what was the nature of that work?

13 A That would be entering questions about the
14 Transact software, how it works, some of the background
15 for understanding that Soverain wanted to make some
16 change.

17 Q And did you go visit the location where
18 Soverain was to make these changes or help make these
19 changes?

20 A I did not.

21 Q Was this all done over the telephone?

22 A And electronically, yes.

23 Q And through electronically.

24 Now, in addition to that work, what other work
25 have you done for Soverain Software?

1 A I have been involved in answering questions
2 about the Open Market patents, the history of Open
3 Market; things of that nature.

4 Q And have you spent time assisting Soverain in
5 the preparation of this lawsuit?

6 A I have been involved in preparing for my
7 testimony and providing background information.

8 Q And how many hours have you spent providing
9 background information and preparing for your testimony?

10 A On -- on this case?

11 Q On this case.

12 A Probably around 150 hours total since the
13 lawsuit was filed.

14 Q And in addition to this case, have you
15 assisted Sovereign Software in preparing other lawsuits?

16 A Yes.

17 Q And what lawsuits were those.

18 A That would include *Soverain v. Amazon* and
19 *Soverain v. J.C. Penney* and other Defendants?

20 Q And how many hours did you spend working on
21 the *Sovereign v. Amazon* case?

22 A I don't recall the exact number.

23 Q During your direct testimony you were asked a
24 number of questions about licensing.

25 Was part of your job to negotiate patent

1 licenses while you were at Open Market?

2 A I was not responsible for negotiating the
3 licenses.

4 Q Did you ever participate in the negotiation of
5 licenses?

6 A I participated in meetings that were part of
7 the long-term discussions, yes.

8 Q But you didn't participate in any individual
9 negotiation for a license?

10 A Not in the actual negotiations.

11 Q So what is the basis of your knowledge that
12 you offered up this morning regarding all these numbers
13 that you threw out that were for various licensees?

14 A Those numbers were general information about
15 the -- from the pricing as discussed at Open Market and
16 through for some of the discussion internally after a
17 deal was closed.

18 Q Did you have any -- you mentioned a lawsuit
19 was filed against Intershop; is that correct?

20 A Yes.

21 Q And that was the outcome of that lawsuit?

22 A I believe that lawsuit was settled.

23 Q And did you -- are you aware of any other
24 lawsuits, while you were at Open Market, that were
25 brought to enforce patent licenses?

1 A No, I'm not.

2 Q Now, I just have to get a little better
3 understanding of the difference between these two, I
4 think you called them licenses for Transact; is that
5 correct?

6 A There were two different license structures
7 for Transact.

8 Q And were these patent licenses or were these
9 licenses for -- of the software, the Transact software?

10 A Those were licenses for the software.

11 Q And you said there were two types of licenses,
12 I believe, the corporate customer?

13 A Yes.

14 Q And the other was the commerce service
15 providers, correct?

16 A Yes.

17 Q What's the difference there, please?

18 A The difference was that a corporate customer
19 would operate Transact on their own behalf. A commerce
20 service provider would operate Transact on behalf of
21 many businesses, typically small to medium-sized
22 businesses.

23 Q So a commerce service provider then was
24 similar to what was originally envisioned for the Open
25 Marketplace?

1 A That's correct.

2 Q And -- and which of these licenses were for
3 the commerce service providers?

4 A I don't understand the question.

5 Q Oh, I'm sorry. You mentioned a number of
6 licensees for the commerce -- that were commerce service
7 providers, did you not?

8 A Earlier I named some companies?

9 Q Yes.

10 A Yes. Companies like AT&T and MCI were
11 commerce service provider customers.

12 Q And did you ever visit sites that they
13 maintained using the Transact software?

14 A Do you mean visit the websites?

15 Q Well, yes.

16 A Yes.

17 Q And did they have other merchants on there
18 besides -- for example, did AT&T have other merchants
19 besides themselves on the site?

20 A That's my understanding.

21 Q That's your understanding, but do you actually
22 know?

23 A I don't recall visiting sites that I knew to
24 be hosted at AT&T.

25 Q Can you tell us what your particular

1 contribution was to the -- what have been called the
2 shopping cart claims in the '319 (sic) and the '492
3 patents?

4 A I can't isolate a specific contribution.

5 Q Can you isolate anybody's specific
6 contribution?

7 A Those inventions came out of a collaborative
8 work and discussion. So I find it hard to make those
9 isolations.

10 Q Did you have anything to do with writing the
11 software for implementing the shopping carts?

12 A I don't recall specifically working on the
13 shopping cart software.

14 Q What about the hypertext statement? Did you
15 work on that?

16 A I don't recall personally working on the
17 hypertext statement software.

18 Q Now, one of the exhibits that you referred to
19 is in front of you in the book that your counsel
20 provided, which is the Exhibit 75.

21 At the bottom -- near the bottom, there's a
22 paragraph -- a paragraph that reads: The web has an
23 existing mechanism to authenticate users.

24 Can you tell us what that existing mechanism was?

25 A I believe that's referring to a mechanism

1 called basic authentication.

2 Q And then there's -- it appears to be a
3 question here: Could this mechanism be used to carry
4 along state information?

5 Did you -- do you recall seeing that question
6 at the time you first saw this document?

7 A I don't recall precisely. It seems likely.

8 Q And -- and isn't it a fact that there was a
9 way to carry state information along with the existing
10 tools of the internet at the time of this document?

11 MR. ADAMO: Your Honor, I'm sorry to
12 interrupt, but we're way outside the scope of the
13 direct, and I'm not sure where we're going, but it
14 sounds like we're going back into invalidity again.

15 THE COURT: Response?

16 MR. HANSON: Well, Your Honor, they put
17 the document in during their direct testimony. I can
18 take it up after -- maybe we should take our lunch break
19 now and we will finish up right after the lunch.

20 THE COURT: How much more do you have?

21 MR. HANSON: I think I could well have
22 another half hour.

23 THE COURT: Okay. I think that would be
24 a good idea.

25 All right, Ladies and Gentlemen of the

1 Jury, we're going to take our noon recess today at this
2 time. And we're going to be in recess until 1:00
3 o'clock. So enjoy your lunch, and we will see you back
4 here at 1:00 o'clock.

5 Be in recess.

6 COURT SECURITY OFFICER: All rise.

7 (Jury out.)

8 (Lunch recess.)

9

10 C E R T I F I C A T I O N

11 I certify that the foregoing is a correct transcript
12 from the record of proceedings in the above-entitled
13 matter.

14

15 /s/

16 SHEA SLOAN, CSR, RPR

17 OFFICIAL COURT REPORTER

18 STATE OF TEXAS NO. 3081

19

20 /s/

21 JUDITH WERLINGER, CSR

22 DEPUTY OFFICIAL COURT REPORTER

23 STATE OF TEXAS NO. 267

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